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In the

Supreme Court of the United States

WILLIAM R. JANOWSKI and ROBERT H. BARNHISEL, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Petitioners,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 710 PENSION FUND, WILLIAM D. JOYCE, JOHN D. KELAHAN, ANTHONY CURCIO, ROBERT J. BAKER, JOHN J. BARRANCO AND ROY M. PRIDE,

Defendants.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Trustees of Teamsters Local No. 710 Pension Plan can deny 15,000 participants ERISA-mandated benefits based upon the normal retirement age of 57 when the plan permits participants to retire and receive full benefits at age 57, simply by redesignating the pre-ERISA normal retirement age of 57 as the regular retirement age?

2. Whether under ERISA the Trustees of Teamsters Local No. 710 Pension Plan can ignore benefits payable under the terms of the pre-ERISA Plan to participants who had completed 20 years of service?

PARTIES TO THE PROCEEDINGS

William R. Janowski and Robert H. Barnhisel, individually and on behalf of all others similarly situated, plaintiff-petitioners.

International Brotherhood of Teamsters Local No. 710 Pension Fund and William D. Joyce, John D. Kelahan, Anthony Curcio, Robert J. Baker, John J. Barranco and Roy M. Pride, Trustees of the Fund, defendants.

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	i
Parties to the Proceedings	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Statutes and Regulation	2
Statement of the Case	3
Argument	7
A. The Trustees of Teamsters Local No. 710 Pension Plan cannot deny 15,000 participants ERISA-mandated benefits based upon the normal retirement age of 57 when the Plan permits participants to retire and receive full benefits at age 57, simply by redesignating the pre-ERISA normal retirement age of 57 as the regular retirement age.	7
B. Under ERISA, the Trustees of Teamsters Local No. 710 Pension Plan cannot ignore accrued benefits payable under the pre-ERISA Plan to participants who had completed 20 years of service.	15
Conclusion	18
Appendix	
A. Opinions Below	
(1) Opinions of the U.S. District Court for the Northern District of Illinois:	
(a) Dated July 24, 1980	1a

PAGE

(b) Dated October 30, 1980 ..... 9a
(c) Dated February 4, 1981 ..... 12a
(d) Dated February 17, 1981 ..... 19a

(2) Opinions of the U.S. Court of Appeals for the Seventh Circuit:
(a) Dated March 8, 1982 ..... 21a
(b) Dated April 7, 1982 ..... 43a, 44a

B. Statutes and Regulation

(1) 26 U.S.C. §411(a)(8) 45a
(2) 26 U.S.C. §411(b)(1)(D) 45a
(3) 29 U.S.C. §1002(24) 46a
(4) 29 U.S.C. §1054(b)(1)(D) 46a
(5) 26 C.F.R. §1.411(a)-7(b)(1) 47a

C. Letter from A.D. Fields, Chief, Employee Plans, Technical Branch, Internal Revenue Service 48a

TABLE OF AUTHORITIES

STATUTES

26 U.S.C. §411(a)(8) 7, 9, 10
26 U.S.C. §411(b)(1)(D) 15, 16
29 U.S.C. §1002(24) 7, 9
29 U.S.C. §1054(b)(1)(D) 15, 16, 17

TREASURY REGULATIONS

Treas. Reg. §1.411(a)-7(b) (1979) 8, 11

REVENUE PROCEDURES

Rev. Proc. 80-20, 1980-1 C.B. 633 10

REVENUE RULINGS

PAGE

Rev. Rul. 78-120, 1978-1 C.B. 117 ..... 8, 10, 11
Rev. Rul. 78-92, 1978-1 C.B. 118 11
Rev. Rul. 76-76, 1976-1 C.B. 106 11
Rev. Rul. 75-480, 1975-2 C.B. 131 11
Rev. Rul. 71-446, 1971-2 C.B. 187 ..... 9, 10, 11
Rev. Rul. 71-147, 1971-1 C.B. 116 ..... 9, 10, 11
Rev. Rul. 57-163, 1957-1 C.B. 128 9

CONGRESSIONAL REPORTS

H.R. Rep. 93-779, 93rd Cong. 2d Sess. 60, 1974-3 C.B. 303 16

IN THE

SUPREME COURT OF THE UNITED STATES

No.

WILLIAM R. JANOWSKI and ROBERT H. BARNHISEL, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

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Defendants.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The unpublished Opinions of the United States District Court for the Northern District of Illinois dated July 24, 1980, October 30, 1980, and February 4 and 17, 1981, are set forth in the Appendix.

The Opinion of the United States Court of Appeals for the Seventh Circuit for which review is sought is set forth in the Appendix. It is officially reported at 673 F.2d at 931 (1982).

JURISDICTION

The Opinion of the United States Court of Appeals was entered on March 8, 1982. The Order denying cross-petitions for rehearing was entered on April 7, 1982.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

The questions presented for review involve important questions of federal law which have not been but should be settled by the United States Supreme Court. The questions are issues of first impression involving the proper interpretation of ERISA. The outcome of this decision directly affects the benefits of approximately 15,302 participants in the I.B.O.T. Local No. 710 Pension Fund and indirectly affects many thousands of participants in other Teamster pension plans which have made similar plan amendments. During 1976 and 1977 alone, 25 surviving spouses of participants who had completed 20 years of service but died between ages 47 and 55 were denied survivors' benefits because of defendants' actions. In addition, benefits of millions of plan participants may be affected by the interpretation of accrued benefits under pre-ERISA pension plans.

STATUTES AND REGULATIONS

The texts of the following statutes and regulation are set forth in the Appendix:

29 U.S.C. §1002(24)
29 U.S.C. §1054(b)(1)(D)
26 U.S.C. §411(a)(8)
26 U.S.C. §411(b)(1)(D)
26 C.F.R. §1.411(a)-7(b)(1)

STATEMENT OF THE CASE

Petitioners, plaintiffs below, are participants in the pension plan of the International Brotherhood of Teamsters Local No. 710 Pension Fund ("the Plan").

The Plan prior to February 1, 1976, ("the pre-ERISA Plan") provided retirement benefits to participants who completed 20 years of service. Normal retirement benefits were paid to participants who retired at the normal retirement age of 57. Early retirement benefits were provided to participants who retired between ages 47 and 57. Deferred vested benefits at age 65 were provided to participants who terminated employment before age 50.

On April 21, 1976, the defendant Trustees amended the Plan ("the Amended Plan") retroactively to February 1, 1976. In the Amended Plan, the Trustees redesignated age 57 as the "Regular Retirement Age" and designated age 65 as the "Normal Retirement Age." By using the newly defined normal retirement age of 65 for determining benefits under the Amended Plan, the Trustees deprived participants who had been enrolled in the pre-ERISA Plan of the following ERISA rights and protections:

(a) The right to have actuarial reductions based upon age 57 rather than age 65 for benefits commencing prior to age 57;

(b) The right to have benefits commence at age 57 rather than at age 65; and

(c) The right to pre-retirement survivor benefits between ages 47 and 57 rather than between ages 55 and 65.

Under the pre-ERISA Plan, participants with at least 20 years of service were entitled to receive, depending upon their respective ages, either (a) $450 at age 57, (b) an amount which had been actuarially reduced from $450 if benefits commenced prior to age 57; or (c) $250 at age 65. In the case of participants who had completed the requisite 20 years of service prior to the amendment of the Plan, the Amended Plan disregards these benefits in calculating participants' accrued benefits. The Amended Plan also does not provide pro rata credit for the accrual of benefits by participants who are employed part-time.

Finally, the Amended Plan changed the method of calculating early retirement benefits and the benefits of vested participants who terminate employment prior to age 50. Under the formula set forth in the Amended Plan, benefits are less for participants who early retire and vested participants with 20 years of service than the benefits provided by the pre-ERISA Plan.

Pursuant to 29 U.S.C. §1132, plaintiffs filed an Amended Complaint alleging that defendants unlawfully reduced benefits already earned and deprived participants of benefits mandated by ERISA in amending the Plan contrary to law and the Plan itself. On February 2, 1979, the District Court certified the following class:

> All persons who are now, or who were as of February 1, 1976 members of Local 710 of the International Brotherhood of Teamsters and who have accepted early retirement or intended to do so under the terms of the Pension Plan of said Local 710 and whose early retirement benefits were or will be affected by the amendments to the Plan made as of February 1, 1976.

Effective July 1, 1979, the Trustees further amended the Amended Plan to provide that participants could elect to receive the benefits upon early retirement or deferred vested retirement provided by the pre-ERISA Plan.

The District Court, by decisions on July 24, 1980, and October 30, 1980, on cross motions for summary judgment, granted defendants' motion and dismissed plaintiffs' claim that age 65 had been improperly designated as the normal retirement age in the Plan. Plaintiffs appealed this conclusion. The District Court also granted plaintiff's motion and ordered that the Amended Plan must be reformed to provide proper benefit accruals for service before 1976 and for part-time service. Because the Amended Plan had been amended to provide for the early retirement and deferred vested benefits about which plaintiffs had complained, further amendments were unnecessary, but the District Court enjoined defendants from acting to reduce such benefits. The court also denied various procedural defenses advanced by defendants. Defendants appealed the portions of the summary judgment orders adverse to them.

Defendants also appealed the District Court's orders of February 4 and 17, 1981, awarding plaintiffs attorneys' fees. Plaintiffs also appealed the fee award to the extent that the fee was reduced by reason of the decision on the retirement age issue.

The Court of Appeals for the Seventh Circuit on March 8, 1982, affirmed the District Court's decision in favor of plaintiffs on the various procedural issues, the part-time credit issue and the award of fees. The Court

of Appeals also affirmed the decision in favor of defendants on the normal retirement issue and reversed the pre-1976 benefit accrual decision. The injunction was removed in the absence of evidence that the Trustees would deprive participants of the benefits now set forth in the Amended Plan. Each party was ordered to bear its own appeal costs.

Cross-petitions for rehearing were denied on April 7, 1982.

ARGUMENT

A. The Trustees of Teamsters Local No. 710 Pension Plan cannot deny 15,000 participants ERISA-mandated benefits based upon the normal retirement age of 57 when the Plan permits participants to retire and receive full benefits at age 57, simply by redesignating the pre-ERISA normal retirement age of 57 as the Regular Retirement Age.

Under ERISA, various features of defined benefit pension plans are based upon the "normal retirement age". Both 29 U.S.C. §1002(24) and 26 U.S.C. §411(a)(8) provide that:

> "the term 'normal retirement age' means the earlier of
>
> (A) the time a plan participant attains *normal retirement age under the plan*, or
>
> (B) the later of — (i) the time a plan participant attains age 65, or (ii) the 10th anniversary of the time a plan participant commenced participation in the plan." (Emphasis added).

Under the pre-ERISA Plan, age 57 had been designated as the normal retirement age since at least 1964. As a result of the Trustees' amendments, the Amended Plan now specifies two ages as retirement ages:

> Age 57 — the "Regular Retirement Age" and
> Age 65 — the "Normal Retirement Age".

Neither is an early retirement age. Early retirement benefits are payable prior to age 57.

Recognizing that "regular" and "normal" are synonymous terms, defendants conceded in their Answer that changing age 57 from the "Normal Retirement Age" in

the pre-ERISA Plan to the "Regular Retirement Age" in the Amended Plan was a mere "rhetorical change".

The District Court concluded, however, that, as defendants had contended, the statutory provisions permit the Trustees to fix a normal retirement age, subject to certain limitations, and that the Amended Plan designated age 65 as the "Normal Retirement Age". After referring to legislative history which indicates that the normal retirement age is generally to be the age set forth in a plan, the District Court stated that:

> "Defendants' position is also consistent with the interpretation adopted by the agency charged with the responsibility to administer these new statutory provisions [Citation omitted]. Department of Treasury regulation 26 C.F.R. (1979) 1.411(a)-7(b) is squarely supportive of that position, as is Revenue Ruling 78-120, 1978-1, C.B. 117, requiring special treatment below age 55.
>
> Plaintiffs rely upon the meaning of 'normal retirement age' as generally understood *prior* to the enactment of E.R.I.S.A. That argument cannot stand against the language of the statute and its legislative history. While plaintiffs cite an interpretive letter from A.D. Fields, Chief, Employee Plans Technical Branch (I.R.S.), which apparently supports their position (Exhibit A to plaintiffs' reply memorandum), that opinion likewise is overcome by the much weightier sources to the contrary." (Emphasis supplied).

Plaintiffs acknowledge that age 65 is designated in the Amended Plan as the "Normal Retirement Age." Plaintiffs submit that the use of synonymous terms, i.e., "Regular" and "Normal", coupled with the admission by defendants that the redesignation of age 57 from the

"Normal Retirement Age" to the "Regular Retirement Age" was a mere rhetorical change, necessitates an analysis of the phrase "normal retirement age under the plan" in 29 U.S.C. §1002(24) and 26 U.S.C. §411(a)(8) to ascertain whether age 57 or age 65 is properly the normal retirement age.

The necessity of analyzing the statutory language would be self-evident if the defendants had used the terms "Age 57 Retirement Age" and "Age 65 Retirement Age" or any other nomenclature. Recourse to such analysis should not be negated because of the use of synonymous terms. As the following analysis reveals, the legal authorities referred to by the District Court fully support plaintiffs' contention.

Prior to ERISA, normal retirement age was defined in Rev. Rul. 71-147, 1971-1 C.B. 116, as follows:

> "The normal retirement age in a pension or annuity plan is the *lowest* age specified in the plan at which the employee has the right to retire without the consent of the employer and receive retirement benefits based on service to date of retirement at the full rate set forth in the plan (i.e., without actuarial or similar reduction because of retirement before some later specified age.)" (Emphasis added.)

See also Section 2.08 of Rev. Rul. 71-446, 1971-2 C.B. 187, which sets forth the identical definition. Reference to employer consents in the rulings relates to rules prohibiting discrimination by employers. The rules pertaining to normal retirement age have been in effect for decades. See Rev. Rul. 57-163, 1957-1 C.B. 128 at 149. Defendants arbitrarily ignored them in amending the pre-ERISA Plan.

Counsel for plaintiffs requested information from the National Office of the Internal Revenue Service concerning the proper interpretation of the phase "normal retirement age under the plan" as used in 26 U.S.C. §411(a)(8)(A). The response received from A. D. Fields, Chief, Employee Plans, Technical Branch, states in relevant part:

> "Normal retirement age is the lowest age specified in a plan at which the employee has the right to retire without the consent of the employer and receive retirement benefits based on service to date of retirement at the full rate (without actuarial reduction for earlier commencement) for such service set forth in the plan."

Such a letter is issued only when the request involves a well-established interpretation or principal of tax law. Rev. Proc. 80-20, 1980-1 C.B. 633, at 4.06.

Revenue Ruling 78-120, 1978-1 C.B. 117, cited by the District Court in support of defendants' position was misapprehended by the Court. The specific normal retirement age approved in Rev. Rul. 78-120 was defined in the following terms:

> "The pension plan provides that, upon attaining a certain specified age (less than 65), the employee has the right to (1) retire without the consent of the employer, and (2) receive benefits based on service to date of retirement at the full rate provided in the plan (i.e., without actuarial or similar reduction because of retirement before some later specified age)."

This is precisely the definition previously set forth in Rev. Rul. 71-147 and Rev. Rul. 71-446. The District Court's conclusion that Rev. Rul. 78-120 supports defendants' interpretation is clearly erroneous.

Equally erroneous is the District Court's assertion that plaintiffs rely upon the meaning of "normal retirement age" as generally understood prior to the enactment of ERISA. Although Rev. Rul. 71-147 pre-dated ERISA, Rev. Rul. 78-120 and the letter from Chief Fields are post-ERISA rulings. Similarly, Rev. Rul. 71-446, which contains the identical definition of normal retirement age, has been modified several times since the enactment of ERISA without any change in this definition. See, e.g. Rev. Rul. 75-480, 1975-2 C.B. 131; Rev. Rul. 76-76, 1976-1 C.B. 106; and Rev. Rul. 78-92, 1978-1 C.B. 118.

As evidenced by the foregoing, the interpretation of the phrase "normal retirement age under the plan" has consistently been interpreted by the Internal Revenue Service before and after the enactment of ERISA. The District Court's conclusion that plaintiffs relied upon pre-ERISA interpretations of "normal retirement age" is clearly erroneous.

Treasury Reg. §1.411(a)-7(b)(1) also supports plaintiffs. The regulation provides in relevant part that:

> "If an age is not specified by a plan as the normal retirement age, then the normal retirement age under the plan is the earliest age beyond which the participant's benefits under the plan are not greater solely on account of his age or services."

In discussing the regulation, defendants have urged that:

> " 'the unrelated benefit' test is at best now only useful in determining the normal retirement age if an age is not specified as such under the pension plan."

Plaintiffs agree that the "unreduced benefit" test is determinative if no age is specified in a plan. However, the "unreduced benefit" test is equally useful to resolve the

ambiguity arising from the use of the synonymous terms "Regular Retirement Age" and "Normal Retirement Age." Under this test, only age 57 can be the normal retirement age under the Amended Plan. Age 57 is the lowest age specified in the Amended Plan, as well as in the pre-ERISA Plan, at which an employee has the right to retire without the consent of the employer and receive retirement benefits based upon service to the date of retirement at the full rate set forth in the Amended Plan, i.e., there is no actuarial or similar reduction of these benefits because of retirement before some later age. Also, benefits commencing after age 57, i.e., at age 65, are greater solely on account of additional service or attainment of a greater age.

The District Court acknowledged its obligation to heed:

> "the interpretation adopted by the agency charged with the responsibility to administer these new statutory provisions."

The Internal Revenue Service's interpretation of "normal retirement age" is evidenced by revenue rulings issued both before and after ERISA, the provisions of the regulation and the interpretative letter from the Chief of the Technical Branch of the Internal Revenue Service. It is the earliest age at which unreduced benefits are payable, i.e., age 57 in the Amended Plan. The Court's failure to heed the Internal Revenue Service's interpretation is reversible error.

By affirming the District Court, the Court of Appeals failed to correct the lower court's error. Its opinion does not discuss the consistent interpretation by the Internal Revenue Service. Moreover, the Court of Appeals appears to have erroneously concluded that age 65 is the normal

retirement age applicable solely to participants who were not enrolled in the pre-ERISA Plan. The Court stated:

> "The amended Plan retained the right to receive benefits at age 57 with 20 years of service but changed the designation from normal retirement to regular retirement and, pursuant to 29 U.S.C. §1002(24) and 26 U.S.C. §411(a)(8), adopted a new normal retirement age of 65, *applicable to participants who were not enrolled in the pre-ERISA Plan.*
>
> . . . .
>
> The trustees conceded that participants in the pre-ERISA Plan have a right to benefits at age 57 after 20 years of credited service but emphasize that the right has been incorporated into the new Plan under the designation regular retirement. They assert that nothing in section 411(a)(8) requires that they designate an age less than 65 as the normal retirement age *for participants who were not enrolled in the pre-ERISA Plan.*
>
> . . . .
>
> We agree that age 65 was permissibly chosen as the normal retirement age *under the new Plan.*" (Emphasis added)

Plaintiffs and the class certified by the District Court do not include participants who were not enrolled in the pre-ERISA Plan. The failure to recognize the distinction between class members and participants who were not enrolled in the pre-ERISA Plan and the Court's ensuing confusion undoubtedly influenced its decision. The Court, apparently believing that retention of age 57 as the regular retirement age protected the pre-ERISA participants, failed to discern that it is such class members who have been deprived of their ERISA rights.

The Appellate Court's confusion is further illustrated by the Court's statement that:

> "Janowski interprets the word 'plan' in the phrase 'normal retirement age under the plan' . . . to refer to the pre-ERISA Plan."

Plaintiffs *never* advanced such an interpretation. The word "plan" in the statute can only refer to the Amended Plan. Plaintiffs' interpretation was of the phrase "normal retirement age under the [Amended] plan." The failure of the Court of Appeals to understand the nature of plaintiffs' argument explains the absence of any discussion of the legal authorities supporting plaintiffs.

Finally, in response to the complaint of plaintiffs that the defendants did not act timely when, on April 26, 1976, they retroactively amended the normal retirement age, the Court of Appeals curiously stated:

> "Janowski makes much of the fact that the normal retirement age was not redesignated until April 21, 1976. *Citing no authority in support,* he argues that in order to change the normal retirement age from 57 to 65 the trustees would have had to make the change before February 1, 1976, the date on which the ERISA reforms were incorporated into the prior Plan." (Emphasis added)

The Court of Appeals apparently overlooked pages 6-10 of Plaintiffs' Reply Brief in which plaintiffs set forth the authorities which preclude defendants' retroactive amendments. The Court's oversight is understandable only in light of its erroneous conclusion that the Normal Retirement Age under the Amended Plan is solely "applicable to participants who were not enrolled in the pre-ERISA Plan." Because this conclusion is clearly erroneous, the decision should be reversed.

B. Under ERISA, The Trustees of Teamsters Local No. 710 Pension Plan Cannot Ignore Accrued Benefits Payable Under the Pre-ERISA Plan to Participants Who Had Completed 20 Years of Service.

In relevant part, 29 U.S.C. §1054(b)(1)(D) and its counterpart, 26 U.S.C. §411(b)(1)(D), provide that a defined benefit pension plan satisfies the benefit accrual provisions imposed by ERISA with respect to years of participation prior to 1976:

> "only if the accrued benefit of any participant with respect to such years of participation is not less than the greater of —
>
> i) his accrued benefit determined under the plan, as in effect from time to time prior to September 2, 1974, or
>
> (ii) an accrued benefit which is not less than one-half of the accrued benefit to which such participant would have been entitled if subparagraph (A), (B), or (C) applied with respect to such years of participation."

In analyzing the statutory provisions, the District Court succinctly and accurately stated:

> "Defendants contend that the old plan, dated August 1, 1973, contained no accrued benefit formula such as now appears in 3.10 of the new plan and that therefore the foregoing subsection (i) is inapplicable. However, the old plan did provide for specific benefits to persons retiring at age 57 after 20 years of qualified service."

The "specific benefits" to which the District Court referred required 20 years of service. For participants having the requisite service, such benefits were fully vested and due and payable in accordance with the terms of the pre-ERISA Plan. The amounts of the benefits

depended upon a participant's age and were either (a) $450 per month at age 57; (b) an amount which was reduced actuarially from $450 per month for benefits commencing prior to age 57; or (c) $250 per month at age 65.

The Amended Plan provides for the accrual of benefits for service prior to January 31, 1976, in accordance with 29 U.S.C. §1054(b)(1)(D)(ii) and 26 U.S.C. §411(b)(1)(D)(iii), i.e., at the rate of one-half the benefit accrual rate for post-ERISA service. In the case of participants having twenty years of service under the pre-ERISA Plan, the resulting accrued benefit as of February 1, 1976 was $165. Even after benefit increases on July 1, 1976, the accrued benefit was $210. Both amounts are less than the benefits actually provided under the pre-ERISA Plan. Because the defendants ignored the actual benefits payable from the pre-ERISA Plan to participants having 20 years of service before April 1976, the District Court properly concluded that the Amended Plan failed to satisfy the statutory requirements for calculating pre-ERISA accrued benefits.

If the District Court erred, it did so solely in concluding that there was an implicit accrual of benefits under the pre-ERISA Plan ratably over each of twenty years. Plaintiffs have never argued that there was an implicit benefit accrual formula in the pre-ERISA Plan. Plaintiffs have maintained only that participants with 20 years of credited service had a definitely determinable accrued benefit under the pre-ERISA Plan and that such benefit was greater than the accrued benefit for pre-ERISA service calculated under the Amended Plan, i.e., $165 per month payable at age 65.

Since plaintiffs' contention is demonstrably correct, if the Court of Appeals properly concluded that the District

Court erred with respect to the implicit accruals, it should have remanded the case to the District Court for further proceedings. The Court of Appeals failed to do so because of its erroneous interpretation of the statutory provisions.

In analyzing the statutory provisions, the Court of Appeals stated:

> "The statute sets forth two formulas to be applied to pre-ERISA years. Subsection [29 U.S.C. 1054(b)(1)(D)] (i) provides that accrued benefits shall be determined under the plan, as in effect from time to time prior to September 2, 1974. This subsection is triggered whenever a prior plan contained an accrued benefit formula. Subsection (ii) provides the formula to be applied if the old plan had no accrued benefit formula."

After reviewing the statutory language, the Court of Appeals erroneously concluded both that the statute required a formula for determining pre-ERISA accrued benefits and that the pre-ERISA Plan did not specify an accrued benefit formula. The Court sought an ERISA-style ratable formula in the pre-ERISA Plan and, of course, found none. The pre-ERISA Plan does, however, have the equivalent of an accrued benefit formula. The pre-ERISA Plan provides for the calculation of accrued benefits under a "back loaded" benefit accrual method, i.e., benefits accrue in the year of completing twenty years of service.

"Back loaded" plans were common prior to the enactment of ERISA. See, e.g. H.R. Rep. 93-779, 93rd Cong. 2d Sess. 60, 1974-3 C.B. 303. "Back loading" is still permitted by ERISA but has been limited by the enactment of ERISA.

Simply stated, subsection (i) of the statutes preserves whatever benefits may have been accrued under a pre-ERISA method of accruing benefits, whether by a ratable formula or by a "back loaded" method, and subsection (ii) limits the amount of "back loading" allowable for pre-ERISA service. The Court of Appeals' failure to recognize the benefits actually accrued by participants having the requisite 20 or more years of service under the pre-ERISA Plan is clearly erroneous and reversible error. The case should be remanded for further proceedings.

CONCLUSION

For the reasons stated, the decision of the Court of Appeals on the retirement age issue and the pre-ERISA benefit accrual issue should be reversed and the case should be remanded to the District Court for further proceedings.

Respectfully submitted,

William R. Janowski and Robert H. Barnhisel, individually and on behalf of all others similarly situated, Petitioners

By: /s/ Lawrence H. Eiger
Lawrence H. Eiger

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM R. JANOWSKI and ROBERT H. BARNHISEL, individually and on behalf of all other similarly situated,

Plaintiffs,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 710 PENSION FUND, et al.,

Defendants.

NO. 78 C 841

DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT ON THE AMENDED COMPLAINT

Both parties have filed motions for summary judgment on the Amended Complaint. Plaintiffs brought this action contesting certain amendments to the Local 710 pension plan, effective February 1, 1976. This case has been certified as a class action pursuant to F.R.C.P. 23(b) (2). Plaintiffs contend that the amendments violate the requirements of E.R.I.S.A. and the trustees' fiduciary duties thereunder. The motions raise solely questions of law.

The court rejects defendants' preliminary challenges to plaintiffs' right to bring this action, as well as defendants' suggested standard of review. Plaintiffs' standing to sue as participants in the plan is created by 29 U.S.C. § 1132(a) (3). We also hold that if the plan amendments violate E.R.I.S.A. requirements, then defendants' official actions are arbitrary and capricious as a matter of law. Thus we deal with plaintiffs' contentions *seriatim* on the merits, as follows.

1. *The alteration of the "normal retirement age" from 57 to 65.* The old plan defined an employee's normal retirement date as the date when he attained his 57th birthday or otherwise became eligible for retirement benefits. Under § 1.16 of the new plan, normal retirement age is 65, "or if later," the participant's age on the tenth anniversary of his participation. Thus the normal retirement date under the new plan is the first day of the month following the participant's attainment of "normal retirement age, " per §1.17.

The crucial phrase "normal retirement age" is defined in E.R.I.S.A. at 29 U.S.C. § 1002(24) and in the Internal Revenue Code at 26 U.S.C. § 411(a) (8). It is the earlier of

(A) the time a plan participant attains normal retirement age under the plan, or

(B) the later of—

(i) the time a plan participant attains age 65, or

(ii) the tenth anniversary of the time a plan participant commenced participation in the plan.

Defendants contend that the definition in § 1.16 of the new plan is controlling, while plaintiffs contend that "normal retirement age" has acquired a technical meaning under this plan as a whole and that age 57 should be retained.

The above definition permits the plan to fix a normal retirement age, subject to certain limitations. Section 1.16 of the new plan does just that. Accordingly, defendants are correct that age 65 is the normal retirement age under the new plan. See *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976).

Absent a clearly expressed legislative intention to the contrary, the statutory language must ordinarily be regarded as conclusive See *Consumer Product Safety Commission* v. *GTE Sylvania*, ... *U.S.* ....., 48 U.S.L.W.

4658, 4659 (June 9, 1980). The legislative history here confirms, rather than detracts from, defendants' position. The House Ways and Means Committee Report twice declares that a given plan will define the normal retirement age, subject to the statutory limitations. 1974 U.S. Code Cong. & Ad. News 4670, 4687, 4726. The House Conference Report is to the same effect:

> . . . In general, the accrued benefit is to be defined in terms of the benefit payable at normal retirement age. Normal retirement age is generally to be the age specified under the plan. However, it may not be later than age 65 or the tenth anniversary of the time the participant commenced participation, which ever last occurs. . . .
>
> . . .

1974 U.S. Code Cong. & Ad. News 5038, 5054-55.

Defendants' position is also consistent with the interpretation adopted by the agency charged with the responsibility to administer these new statutory provisions. Cf. *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450-51 (1978). Department of Treasury regulation 26 C.F.R. (1979) § 1.411(a)-7(b) is squarely supportive of that position, as is Revenue Ruling 78-120, 1978-1 C.B. 117, requiring special treatment below age 55.

Plaintiffs rely upon the meaning of "normal retirement age" as generally understood *prior* to the enactment of E.R.I.S.A. That argument cannot stand against the language of the statute and its legislative history. While plaintiffs cite an interpretive letter from A.D. Fields, Chief, Employee Plans Technical Branch (I.R.S.), which apparently supports their position (Exhibit A to plaintiffs' reply memorandum), that opinion likewise is overcome by the much weightier sources to the contrary.

Plaintiffs' claim that 57 is technically the "normal retirement age" under the new plan is the linchpin for several alleged E.R.I.S.A. violations. In view of our conclusion that age 65 is the "normal retirement age" under

§ 1.16 of the new plan, the remainder of this decision addresses only plaintiffs' claims that do not depend upon their erroneous interpretation of "normal retirement age."

2. *Section 3.10 of the new plan should provide for a minimum vested pension for participants who were employed before February 1, 1976.* Section 3.10 of the new plan provides for the calculation of a vested pension. The participant becomes eligible under §3.09 after 10 years of service if other pension alternatives are not available to him. Section 3.10 provides for a level of benefits which plaintiffs correctly contend is in part inconsistent with 26 U.S.C. § 411(b) (1) (D) and 29 U.S.C. § 1054 (b) (1) (D). These sections provide in pertinent part as follows:

> (D) Subparagraphs (A), (B), and (C) shall not apply with respect to years of participation before the first plan year to which this section applies, but a defined benefit plan satisfies the requirements of this subparagraph with respect to such years of participation only if the accrued benefit of any participant with respect to such years of participation is not less than . . .
>
> (i) his accrued benefit determined under the plan, as in effect from time to time prior to September 2, 1974 . . .

Defendants contend that the old plan, dated August 1, 1973, contained no accrued benefit formula such as now appears in § 3.10 of the new plan and that therefore the foregoing subsection (i) is inapplicable. However, the old plan did provide for specific benefits to persons retiring at age 57 after 20 years of qualified service. Since the full benefit was $450.00 per month, 1/20th was implicitly accrued in each of the 20 years of qualified service. Thus § 3.10 of the new plan should be liberalized as proposed by plaintiffs in their filing of February 4, 1980.

3. *Defendants have failed to provide appropriate accrual for part-time service.* This claim attacks §4.04 of

the new plan, which allocates service credit on three broad bases: (1) those with less than 20 weeks of covered service receive no credit, (2) those with 20 but less than 35 weeks receive one-half credit, and (3) those with 35 weeks or more receive one full year's credit.

This rough allocation of credit is, in our opinion, contrary to 26 U.S.C. § 411(b) (3) (B), which provides as follows:

> (B) *Less than full time service.* For purposes of this paragraph, except as provided in subparagraph (C), in the case of any employee whose customary employment is less than full time, the calculation of such employee's service on any basis which provides less than a ratable portion of the accrued benefit to which he would be entitled under the plan if his customary employment were full time shall not be treated as made on a reasonable and consistent basis [such a basis is mandated by § 411(b) (3)(A).]

29 C.F.R. (1979) § 2530.200b-3(e)(ii) provides that each week of service be treated as the equivalent of 45 service hours. If each week is the equivalent of 45 hours, § 4.04 of the new plan gives no credit for less than 900 hours because it gives none for less than 20 weeks. The plan gives one-half year credit for 900 to 1574 hours, and a full year's credit for 1575 or more hours. The regulations, however, offer two examples which are designed to satisfy the statutory requirement: (1) each employee with more than 1000 hours of covered service is granted credit on a pro rata basis, or (2) those with more than 1000 hours are granted a percentage of a full year's credit in gradations of 10 percent (29 C.F.R. (1979) § 2530.204-2(c)(4)).

Therefore, although defendants are not required by § 411(b)-(3)(C) to grant credit for the first 1000 hours (approximately 21 service weeks at 45 service hours per week), the statute and regulations require a more accurate pro rata credit thereafter. Section 4.04 of plain-

tiffs' proposed plan amendment, filed February 4, 1980, should be incorporated in the new plan, thus conforming it to the "ratable portion of the accrued benefit" requirement set forth in § 411(b)(3)(B).

4. *Section 3.08 of the new plan sets out a deficient schedule for awarding early retirement benefits.* Plaintiffs have demonstrated that the schedule in § 3.08 reduces early retirement benefits which were payable under the prior plan. (See paragraph 18 of the Amended Complaint which, although denied in defendants' answer, has subsequently been effectively conceded.) A reduction violates 26 U.S.C. § 411(d)(6), and 26 C.F.R. (1979) § 1.411(d)-3(b).

Defendants amended the new plan effective July 1, 1979, by permitting participants who entered covered employment prior to July 1, 1976 to choose the previous early retirement benefits. The amendment should have applied retroactively, in order to make it available to those persons who terminated their employment prior to the amendment.

Since the improper schedule contained in the new plan prior to the amendment could be re-adopted by the trustees, and since retroactivity is not specifically provided for, plaintiffs are entitled to injunctive relief on this phase of their case.

5. *Defendants have improperly reduced vested retirement benefits.* Under the old plan, an employee with 20 or more years of service was entitled to a deferred benefit payable for life after reaching the age of 65. (Article III, Sec. 18.) Under § 3.09 of the new plan, a vested pension benefit is available to those covered employees with more than 10 years of service, but, for employees with 20 or more years of service the deferred benefit is less than would have been paid under the old plan. Thus the benefit level for these employees, when the employee is not eligible for some other plan benefit, has been reduced relative to the old plan. This also violates § 411(d)(6).

Defendants contend that, in practice, the deferred benefit option available under the old plan is made available to covered employees who would have qualified thereunder. This practice is not spelled out in the new plan nor in its descriptive pamphlet. 29 U.S.C. § 1022(b) requires that the plan description and summary plan description describe all provisions for non-forfeitable benefits.

Therefore, the practice which defendants contend is available under the new plan should be specifically provided for, as contained in plaintiffs' proposed amendment to § 3.10, filed February 4, 1980.

Both parties have asked for attorneys' fees and costs pursuant to 29 U.S.C. § 1132(g). We perceive no ground for making such an award to defendants, and any award to plaintiffs will depend upon the proper interpretation and application of § 1132(g).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiffs file an order for declaratory and injunctive relief, agreed as to form, within fifteen (15) days of the entry hereof, which will accomplish the following amendments to defendants' plan as it now exists:

(1) Section 3.08 shall provide for early retirement benefits on at least the same terms as under the old plan, retroactively for those who terminated employment prior to July 1, 1979, without any further reduction by amendment;

(2) Section 3.10 shall provide for calculation of a vested pension, including appropriate accrual of benefits for covered service prior to 1976;

(3) Section 3.10 shall be amended to provide for a deferred benefit, as under the old plan, payable after 20 or more years of covered service at age 65;

(4) Section 4.04 shall provide a reasonable and consistent basis for calculating accrual of benefits for less than full time service.

Plaintiffs may also serve and file a motion for attorneys' fees and costs, supported by affidavits of the time expended and the qualifications of the attorney charging such time, to be briefed pursuant to Local Rule 13.

This case will be called for entry of a judgment order on Monday, September 8, 1980 at 11:30 a.m.

ENTER: /s/ Thomas R. McMillen
Judge, U.S. District Court

Dated: July 24, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM R. JANOWSKI and ROBERT H. BARNHISEL, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 710 PENSION FUND, et al.,

Defendants.

NO. 78 C 841

Judge Thomas R. McMillan

ORDER

This cause came on to be heard on the Plaintiffs' and Defendants' Cross Motions For Summary Judgment. Supporting briefs were filed on behalf of both parties. The Court has considered the pleadings and exhibits introduced, and the arguments of counsel.

A written Opinion dated July 24, 1980 was rendered by the Court on the Cross Motions for Summary Judgment. Pursuant to an agreed Order dated August 4, 1980, further proceedings were stayed until September 9, 1980. The Court, on September 8, 1980, ordered defendants to agree as to the form of amendments to the International Brotherhood of Teamsters Local No. 710 Pension Plan, implementing its opinion of July 24, 1980 on or before October 20, 1980. Defendants, having declined to so act.

IT IS ORDERED, ADJUDGED AND DECREED THAT:

(a) Plaintiffs have standing to sue as participants in the International Brotherhood of Teamsters Local No. 710 Pension Plan, pursuant to 29 U.S.C. 1132(a).

(b) Defendants' preliminary challenges to Plaintiffs' right to bring this action are denied.

(c) Defendants' official actions in connection with the adoption and implementation of amendments to the Local No. 710 Pension Plan which violate ERISA requirements are arbitrary and capricious as a matter of law.

(d) The Trustees' adoption in Section 1.16 of the Local No. 710 Pension Plan, effective February 1, 1976, of age 65 or the participants's age on the tenth anniversary of his participation in the Local No. 710 Pension Plan, whichever is later, as the "normal retirement age" for the purposes of the Plan is in compliance with ERISA. All of the plaintiffs' claims, which are based upon, arise out of or relate to plaintiffs' claim that age 57 is, or should be, the "normal retirement age" under the Local No. 710 Pension Plan effective February 1, 1976, are hereby dismissed with prejudice.

(e) Section 3.10 of the Local No. 710 Pension Plan is inconsistent with the requirements of 29 U.S.C. §1054 (b)(1)(D) and must be reformed to provide for the accrual of benefits at the rate of $22.50 for each year of credited service prior to February 1, 1976, subject to a maximum of $450.00.

(f) Section 4.04 of the Local No. 710 Pension Plan is contrary to the requirements of 26 U.S.C. §411(b)(3) (B) and must be reformed to provide for a more accurate ratable portion of the accrued benefit for less than full-time service on a reasonable and consistent basis.

(g) Section 3.08 of the Local No. 710 Pension Plan reduced early retirement benefits contrary to the requirements of 26 U.S.C. §411(d)(6). Defendants amended the Plan effective July 1, 1979, by permitting participants who entered covered employment prior to February 1, 1976, to choose the previous early retirement benefits. Since retroactivity is not specifically provided for in the July 1, 1979 amendments, the defendants are ordered to

reform Section 3.08 to provide for such retroactivity; and are further enjoined from revoking such amendments.

(h) Section 3.10 shall be amended to provide for a deferred benefit, as under the Old Plan, payable after 20 or more years of covered service at age 65.

(i) Within 20 days, the Trustees are required either to amend the International Brotherhood of Teamsters Local No. 710 Pension Plan by adopting an amendment which is in a form substantially similar to the Amendment attached hereto as Exhibit A, or serve and file substitute provisions which are not inconsistent with the Court's written Opinion dated July 24, 1980, to be effective as of February 1, 1976.

(j) Defendants shall pay the plaintiffs' costs of this litigation plus reasonable attorneys' fees.

/s/ Thomas R. McMillen
Judge, United States District Court

Dated: October 30, 1980

Agreed As To Form:

Albert L. Grasso
For plaintiffs

_____

For defendants

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM R. JANOWSKI and ROBERT H. BARNHISEL,

Plaintiffs,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 710 PENSION FUND, et al.,

Defendants.

NO. 78 C 841

DECISION ON FEES

Following our decision on the merits dated July 24, 1980, attorneys for plaintiffs filed a petition for attorneys' fees and expenses. They take no position concerning which of the defendants should be held responsible for their fees and expenses. The petition is opposed by defendants, primarily seeking a reduction.

Fees and expenses are clearly authorized by § 502(g) of E.R.I.S.A. which provides (29 U.S.C. § 1132(g)):

> In any action under this subchapter by a participant . . . the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

The foregoing statute makes it clear that the award of any attorney's fees is discretionary with the court and must be reasonable. As was our decision on the merits of the complaint, there is little guidance from other courts concerning the proper application of the statute. In our opinion the statute must be applied in the light of cases in other fields of law to the extent they are relevant but that these cases are primarily

valuable in guiding the exercise of the court's discretion, not as binding authority.

As far as the first step in the exercise of our discretion is concerned, we have no doubt that plaintiffs' attorneys are entitled to reasonable compensation for their successful prosecution of this case. *Newman* v. *Piggie Park Enterprise*, 390 U.S. 400 (1968). Defendants contend, *inter alia*, that plaintiffs were only partially successful, in that one of their principal contentions was not adopted by the court, but this is a matter to be considered in measuring the amount, not the entitlement. It is the rare case in which one side or the other is completely successful when several issues are involved. Particularly in a contested class action, there are many preliminary issues, including the issue of class certification in this case, on which plaintiffs do not always prevail. Discovery motions often are not decided in favor of the ultimately successful party. It is the prevailing party, not the wholly successful party, which is entitled to reasonable attorney's fees, in our opinion. The test for awarding any fees, therefore, is whether plaintiffs prevailed on the merits generally. Unless some claims were made recklessly or in bad faith, we do not believe that the attorney's fees for the prevailing plaintiffs should be based on the number of motions or issues on which they were successful. Otherwise, the fixing of reasonable fees would be reduced to a tabulation of minutiae rather than compensation for the general results achieved.

The next exercise of discretion involves the amount of a reasonable fee. This consists, usually, of three components: time expended, value or quality of the time, and a possible multiplier due to contingency features. Cf. *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309, 1322 (7th Cir. 1974), *cert. denied* 425 U.S. 997 (1975); cf. *Copeland* v. *Marshall*, ... F.2d ...., 23 FEP Cases (BNA) 967, 974-76 (D.C. Cir. 1980).

Defendants do not seriously challenge the amount of time expended by the attorneys for the plaintiffs in this

case, other than raising the objection that all of the time was not spent on matters on which plaintiffs prevailed. The plaintiffs attorneys' affidavits show a total of 703.5 hours expended by them and 3.7 hours by paralegals. In other instances we have not allowed fees for paralegals when statutory language controls the award. In this case, § 502(g) applies to an "attorney's fee" and therefore the amount of time expended by paralegals is not covered. In this case the paralegals' time was logged for "court filings," not a legal function. It constitutes part of the general operating expenses, similar to that of secretaries and messengers. We therefore will not award any compensation for this particular expenditure of time, but the remaining 703.5 hours is eminently reasonable in view of the nature of this case.

The next component is the reasonable hourly charge for each attorney. The principal attorney representing plaintiffs, Albert L. Grasso, Esq., spent 576.6 hours and seeks compensation at the hourly rate of $100.00 an hour. Defendants point out that this attorney's time had previously been charged at $60.00 per hour in 1978 to $95.00 in 1980. This raises the question of whether fees are being awarded for the value of the attorney's work as of the time the fee petition is filed or as of the time when the services were rendered. Contested litigation by its very nature causes a delay of a year or more in evaluating an attorney's work, and this hiatus can be aggravated by an appeal, as is pending in this case. By the time the fees are actually paid (if ever), the combined effect of inflation and additional expertise will presumably increase the reasonable value of an experienced attorney's time, assuming that he remains active. Furthermore, in a contingency case such as this one, he and his partners are being deprived of the use of any fees which would otherwise be paid either at the time when the services are performed or at the time when the fees are awarded. These considerations, in our opinion, tend to offset the defendants' objections sufficiently so that we find the proper criterion in this case is the

reasonable value of the attorney's time as of the date when the petition is filed.

Mr. Grasso's affidavit amply supports his hourly rate of $100.00. His affidavit is amplified by one executed by a partner in another law firm where he worked from 1974 through September 1977. The lead attorney for the defendants has shown that his own hourly rate charged in this case was $90.00 an hour, and we take judicial notice of the fact that defendants' attorney and his firm represent many unions on a continuing basis which provides an inducement for maintaining an hourly rate over a continuing period of time which is lower than would be charged for transitory clients.

In short, we find that Mr. Grasso's hourly rate of $100.00 is fair and reasonable and is consistent with the rate charged by attorneys doing similar work in the City of Chicago. Having so found, it follows that the hourly rates charged by the other attorneys for plaintiffs with similar or greater expertise than Mr. Grasso is also fair and reasonable.

The fee which would be awarded to the plaintiffs' attorneys at the foregoing hourly rates total $71,502.50, according to our calculation. In addition, however, Mr. Grasso requests a multiplier of 3, and two of his partners request a multiplier of 2. Two other partners request no multiplier, presumably because of the small amount of work logged by them on this case. The difficult problem in this case is whether or not a multiplier should be used and, if so, how great a multiplier, particularly since plaintiffs did not prevail on one principal issue in this case.

A principal justification for a multiplier is the contingency of prevailing in representation. Plaintiffs' attorneys point out that had they been unsuccessful in this case, they would have received no fees. It was a case of first impression under E.R.I.S.A., with no help from any outside source, so the contingency of failure was not negligible.

A second justification for a multiplier is the financial results obtained. The judgment in this case will provide benefits averaging from $48,960 to $58,140 over the life expectancy of retirees whose benefits were fully vested by 1976, the actual amounts depending upon the starting date for eligibility and the duration of the retiree's life (affidavit of Marcus D. Grayck dated Oct. 17, 2980). The number of employees who will ultimately receive such benefits cannot be known as of now, but there are 15,302 participants presently in the plan. If only 1 percent actually receive the additional increments, their benefits will total almost $7,500,000. (No such figures, incidentally, were argued or considered in the merits of our decision.) Other benefits awarded by our decision are not included in the foregoing calculation but will be substantial. cf. *Copeland* v. *Marshall, supra,* at 23 FEP 986.

There can be no doubt, therefore, that plaintiffs have obtained a financial benefit for many members of the class. Without the diligence and ability of plaintiffs' attorneys, retirees under the defendant's fund and apparently under other employee pension funds would have been underpaid. On the other hand, plaintiffs' attorneys' fees will not be paid out of a fund which is being recovered from the defendants nor because of their illegal activities, as in *In re Folding Carton Antitrust Litigation,* 84 F.R.D. 245 (N.D. Ill. 1979) and in *Lindy Bros. Builders* v. *American Radiator & Standard Sanitary Corp.,* 540 F.2d 102 (3d Cir. 1973 and 1976). Nor can the benefits to be received by the class be accurately computed even after the appeal, since they will continue to be received for an indefinite time. We therefore cannot find that this case is similar to most of those relied upon by plaintiffs. As in the case on the merits, this one is *sui generis.*

We find and conclude that a multiplier of 2 should be awarded in this case, for reasons similar to those discussed in *Lindy II, Supra. We* see no good reason for awarding the higher multiplier request for Mr. Grasso

over that requested for his two partners, even though his efforts and talents were primarily responsible for prosecuting this case. Any multiplier higher than 2 in our opinion would overlook the fact that plaintiffs were not wholly successful and that their attorneys' fees must be paid out of the pension fund itself, which is owned in equity by all participants and not solely by members of the class; also a multiplier higher than 2 is ordinarily used in cases where the defendants have been guilty of some knowing or at least notorious violation of the law.

This brings us to the final question of who should be responsible for payment of plaintiffs' fees. Defendants contend that whatever fees are paid must come out of the finite amount of the pension fund. If the fund were not sufficient to pay all the benefits, then defendants' contention that the fees must come out of benefits to be paid to persons not affected by our decision would be more plausible. However, plaintiffs point out that the fund now amounts to over $222,500,000 and that the plan's assets increased by more than $27 million over the payments of benefits during the fiscal year ending January 31, 1980. Finally, the fund itself paid $1,158,861 in attorney's fees for fiscal year ending January 31, 1980, compared to which the fees for plaintiffs' attorneys would be a relatively small burden.

Although the trustees are necessary parties defendant and apparently have some type of insurance coverage, we do not find that they acted in bad faith or with an intent to deprive the plaintiff class of proper benefits. They may have been negligent in failing to abide by certain requirements of E.R.I.S.A., or they may have relied on inadequate advice. In one instance, however, they failed to comply with one order which this court entered on July 24, 1980 to minimize the expense to be incurred by plaintiffs and also to take advantage of the expertise which presumably was available to the defendants. Their dereliction was in failing to cooperate with plaintiffs to reach a declaratory judgment agreed to in form only and in drafting the necessary amendments to

the pension plan. (See defendants' Statement of Position filed October 16, 1980.) Just how much additional expenditure of time by plaintiffs' attorneys after that date was caused by the refusal of defendant trustees to cooperate cannot be ascertained from the time sheets which have been filed. We therefore will ask them to segregate this particular portion of their time by affidavit, and this much will then be charged against the defendant trustees.

It Is Therefore Ordered, Adjudged And Decreed that:

1. Attorneys for the plaintiffs reasonably expended 703.5 hours in the prosecution of this case in the trial court. They are entitled to be compensated for this time at their regular hourly rates of $100.00 for Messrs. Grasso, Skirnick and Valiulis and at the rate of $125.00 for Messrs. Freed and Eiger.

2. The foregoing fees will be multiplied by 2 for Messrs. Grasso, Skirnick and Freed (the only attorneys seeking a multiplier) because of the contingent and unusally expert services performed by these attorneys in filing and prosecuting a complicated case of first impression for which no other attorneys or persons shared the burden.

3. Costs and expenses in the amount of $808.35 are awarded in addition, there being no contest as to the amount.

4. Attorneys for the plaintiffs will serve and file an appropriate judgment order, supported by an affidavit separating out the fees to be awarded against the defendant trustees in accordance with the foregoing decision.

This case will be called on Tuesday, February 17, 1981 at 11:30 at which time defendants may present their objections to the foregoing judgment order orally.

Enter:

/s/ Thomas R. McMillen
Judge, U. S. District Court

Dated: Feb. 4, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASERN DIVISION

WILLIAM R. JANOWSKI and ROBERT H. BARNHISEL, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 710 PENSION FUND, et al.,

Defendants.

No. 78 C 841

Judge Thomas R. McMillen

ORDER

This cause came on to be heard on the Plaintiffs' and Defendants' Cross Motions for Summary Judgment. A written opinion dated July 24, 1980 was rendered by the Court on the Cross Motions for Summary Judgment which provided, inter alia, for the award of plaintiffs' costs and reasonable attorneys' fees. Affidavits and supporting briefs were filed on behalf of both parties. The Court has considered the documents and the arguments of counsel.

An Order was entered on October 30, 1980 resolving all issues other than the amount of attorneys' fees and costs. A written opinion dated February 4, 1981 having been rendered by the Court on the issue of the amount of attorneys' fees and costs,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

(a) Attorneys for the plaintiffs reasonably expended 703.5 hours through October 6, 1980 and an additional

6.7 hours through January 19, 1981 in the prosecution of this case.

(b) Attorneys for the plaintiffs are entitled to compensation for the time expended at their regular hourly rates of $100.00 for Messrs. Grasso, Skirnick and Valiulis and at the rate of $125.00 for Messrs. Freed and Eiger.

(c) The foregoing fees will be multiplied by 2 for Messrs. Grasso, Skirnick and Freed (the only attorneys seeking a multiplier) for the reasons set forth in the opinion dated February 4, 1981.

(d) Taking the foregoing into account, defendants shall pay plaintiffs' reasonable attorneys, fees in the amount of $142,485.00. Of this amount, $1,940.00 shall be paid by the defendant trustees and the balance shall be paid by the defendant International Brotherhood of Teamsters Local No. 710 Pension Plan.

(e) Defendant International Brotherhood of Teamsters Local No. 710 Pension Plan shall reimburse plaintiffs for costs and expenses in the amount of $808.35, there being no contest as to the amount.

(f) There is no just reason to delay further the enforcement or appealability of the Order dated October 30, 1980 or this Order.

_____

Judge, United States District Court

Dated: _____

Opinion by Judge Bauer

Judge Fairchild *concurring in part, dissenting in part.*

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Corrected March 30, 1982

March 8, 1982.

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Senior Circuit Judge*
Hon. WESLEY E. BROWN, *Senior District Judge**

Nos. 81-1340 and 81-1359

WILLIAM R. JANOWSKI and ROBERT H. BARNHISEL, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees, Cross-Appellants,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 710 PENSION FUND, WILLIAM D. JOYCE, JOHN D. KELAHAN, ANTHONY CURCIO, ROBERT J. BAKER, JOHN H. BARRANCO and ROY M. PRIDE,

Defendants-Appellants, Cross-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 78-C-841

Judge THOMAS R. MCMILLEN

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* The Honorable Wesley E. Brown, Senior Judge of the United States District Court for the District of Kansas, is sitting by designation.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED in part and REVERSED in part, in accordance with the opinion of this Court filed this date. Each party is to bear its own costs on appeal.

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Nos. 81-1340 & 81-1359

WILLIAM R. JANOWSKI and ROBERT H. BARNHISEL, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees, Cross-Appellants,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 710 PENSION FUND, WILLIAM D. JOYCE, JOHN D. KELAHAN, ANTHONY CURCIO, ROBERT J. BAKER, JOHN H. BARRANCO and ROY M. PRIDE,

Defendants-Appellants, Cross-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 78 C 841—THOMAS R. MCMILLEN, *Judge.*

ARGUED SEPTEMBER 28, 1981—DECIDED MARCH 8, 1982

Before BAUER, *Circuit Judge,* FAIRCHILD, *Senior Circuit Judge,* and BROWN, *Senior District Judge.**

BAUER, *Circuit Judge.* The issue in this appeal is whether the International Brotherhood of Teamsters Local No. 710 Pension Fund (the Fund or Plan) as amended complies with the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et*

* The Honorable Wesley E. Brown, Senior Judge of the United States District Court for the District of Kansas, is sitting by designation.

seq. Two Plan participants, William R. Janowski and Robert H. Barnhisel (collectively Janowski), initiated this action alleging that the amendments deprived them of benefits which vested before ERISA became effective. The suit ultimately proceeded as a class action on behalf of all pre-ERISA participants of the Fund whose early retirement benefits were, or might be, affected by the amendments.

The district court approved some of the amendments and disapproved others. It held that the designation of 65 as the normal retirement age under the amended Plan was permissible. It found, however, that the methods adopted for calculating accrued benefits for pre-ERISA service, for part-time service, and for certain early retirement and vested retirement benefits were improper. It also found that the initial Summary Plan Description Booklet distributed to Plan participants explaining the revisions did not clearly advise them of the option to elect benefits under either the old or the new Plan, whichever was greater. For these reasons, the district court entered a permanent injunction enjoining the trustees of the Fund from revoking the option of any participant who entered covered employment before July 1, 1976, to choose benefits under the prior Plan. It also awarded plaintiffs attorneys' fees in the amount of $142,485.00. Both sides have appealed. We affirm in part and reverse in part.

Each party assigns numerous errors. The trustees allege that plaintiffs may not bring this suit either as individuals or as class representatives. They attack the district court's finding that there was an implied accrual of benefits in the original Plan which had to be reflected in the formula adopted for computing pre-ERISA service credit and assert that the formula chosen to provide accrued benefits for part-time employees complies with the statute because it is both ratable and reasonable, as required by 29 U.S.C. §1054(b)(3)(B). The trustees also maintain that they did not reduce any vested benefits available under the prior Plan as set

forth in the July 1979 Summary Plan Description Booklet because participants enrolled in the pre-ERISA Plan may elect to receive the benefits under either Plan. Therefore, they argue that the injunction preserving this option was unwarranted. Finally, the trustees assert that the award of attorneys' fees is improper because the litigation has failed to benefit the entire class of Fund participants and has not added to the Fund's assets.

In contrast, Janowski maintains that 57 should have been designated as the normal retirement age because that was the normal retirement age under the prior Plan. He contends that the change from 57 to 65 deprives Fund participants of vested rights to: (1) reasonable actuarial reductions for benefits beginning before 57; (2) benefits beginning at 57 instead of 65; and (3) pre-retirement benefits between 47 and 57. Additionally, Janowski contends that if the class prevails on the issue of the normal retirement age the amount of the fee award should be increased to reflect this fact.

I

Initially, the trustees challenge Janowski's right to bring this action on several grounds and urge dismissal for lack of subject matter jurisdiction. They argue that this case is not ripe because no pre-ERISA Plan participant has applied for and been denied any benefits. The trustees maintain that the named plaintiffs cannot allege any concrete injury because they are not yet ready to retire and have never applied for early retirement benefits and that they do not have a common interest with the entire class of Fund participants. Additionally, the trustees allege that the exhaustion doctrine is applicable to ERISA actions and assert that Janowski has failed to pursue his administrative remedies.

The trustees' contention that the exhaustion doctrine applies to ERISA actions is persuasive. Although section 1132 provides that a civil action may be brought by a participant "to clarify his rights to future benefits under

the terms of the plan," 29 U.S.C. § 1132, it is silent as to whether exhaustion is a prerequisite for exercising this statutory right. While this issue has not yet been considered by this court, the Ninth Circuit has held that "sound policy requires the application of the exhaustion doctrine in suits under the Act." *Amato* v. *Bernard*, 618 F.2d 559, 567 (9th Cir. 1980).

Assuming *arguendo* that the exhaustion doctrine should be applied to ERISA cases, the doctrine is not absolute, *White Mountain Broadcasting Co., Inc.* v. *FCC*, 598 F.2d 274 (D.C. Cir.), *cert. denied*, 444 U.S. 963 (1979), and unless statutorily mandated, its application is committed to the sound discretion of the court. *Aleknagik Natives Ltd.* v. *Andrus*, 648 F.2d 496 (9th Cir. 1980). Where exhaustion is not specifically required by the statute, the direct court's discretionary decision may only be disturbed on appeal when there has been a clear abuse of discretion. *Medina* v. *Castillo*, 627 F.2d 972 (9th Cir. 1980).

Exhaustion has no relevance here, for the doctrine is only appropriate where it is necessary to develop a full factual record or to take advantage of agency expertise. *Aleknagik Natives Ltd.* v. *Andrus*, 648 F.2d 496 (9th Cir. 1980). Thus, the exhaustion doctrine has been applied in ERISA cases only in situations where an individual has applied for and been denied current benefits. In contrast, this case concerns clarification of the right of an entire class to future benefits. This issue is solely a question of statutory interpretation and does not require a factual record. *See McKart* v. *United States*, 395 U.S. 185, 197-99 (1968); *Frontier Airlines* v. *CAB*, 621 F.2d 369 (10th Cir. 1980). Since the reasons for the doctrine are not present, the district court did not abuse its discretion in waiving the exhaustion requirement.

We reject the trustees' contention that this case is a "battle of hypotheticals, a classic example of the difficulty of deciding a case concerning a complex technical subject without the benefit of specific facts." Defen-

dants-Appellants, Cross-Appellees' br. at 35. Janowski seeks a determination of the nature and scope of Plan participants' right to future benefits. Section 1132 provides that a civil action may be brought "by a participant . . . to clarify his rights to future benefits under the terms of the plan . . . ." 29 U.S.C. § 1132. This action is precisely the type of action contemplated by the statute.

Lastly, the trustees' argument that the named plaintiffs are inadequate class representatives because they have no common interest with all Fund participants ignores the fact that the class which Janowski purports to represent, and which the trial court certified, includes only "[a]ll persons who are now, or who were as of February 1, 1976, members of Local 710 of the International Brotherhood of Teamsters and who have accepted early retirement or intend to do so under the terms of the Pension Plan of said Local 710 and whose early retirement benefits were or will be affected by the amendments to the Plan made as of February 1, 1976." The named plaintiffs certainly have interests in common with this class. The preliminary challenges to the right to bring this action fail.

II

The technical issues and the specific sections involved in this case must be analyzed in light of the scope and spirit of ERISA as a whole. Designed to revamp private employee pension plans to ensure minimum vesting, funding, and insurance benefits, H.R. No. 1522, 93rd Cong., 1st Sess. *reprinted in* [1974] U.S. Code. Cong. & Ad. News 4639, 4647-48, ERISA is, of necessity, a highly complex and detailed statute. Three administrative agencies, the Internal Revenue Service (IRS), the Department of Labor, and the Pension Benefit Guaranty Corporation, are charged with insuring that employers amend their pension funds to conform to the statute.

The Fund involved here was created in 1955 pursuant to a collective bargaining agreement. It provided for retirement, survivor, disability, and death benefits for which the employer contributed on behalf of its employees. The Plan was amended on April 21, 1976, but was retroactively effective as of February 1, 1976. After the amendments, the Plan was submitted to the IRS and approved. Thereafter, in January 1978, a booklet describing the previsions and reprinting the text of the new Plan was published for Plan participants. The option of participants with pre-ERISA service to take early retirement benefits under the prior Plan did not appear in either the text of the Plan or the Plan description. These omissions were corrected in the revised booklet, distributed in July 1979, where the option was included in the text of the Plan and the Plan description.

Under the prior Plan a participant was entitled to benefits on the normal retirement date, the date on which the participant reached age 57 and had accumulated 20 years of credited service. The amended Plan retained the right to receive benefits at age 57 with 20 years of service but changed the designation from normal retirement to regular retirement and, pursuant to 29 U.S.C. § 1002(24) and 26 U.S.C. § 411(a)(8),[1] adopted a new normal retirement age of 65, applicable to participants who were not enrolled in the pre-ERISA Plan.

Since calculations of vesting and accrued benefits are based on the normal retirement age, the age designation significantly affects the amount of benefits the partici-

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[1] Both 29 U.S.C. § 1002(24) and 26 U.S.C. § 411(a)(8) define normal retirement age as:

> (A) the time a plan participant attains normal retirement age under the plan, or
>
> (B) the later of—
>
> (i) the time a plan participant attains age 65, or
>
> (ii) the 10th anniversary of the time a plan participant commenced participation in the plan.

pant receives. Section 411(a)(8) defines normal retirement age as the earlier of: (A) the time a Plan participant attains normal retirement age under the Plan or (B) the later of the time a Plan participant attains 65 or accumulates 10 years of credited service. 26 U.S.C. § 411(a)(8). Janowski argues that subsection (A) mandates that the normal retirement age remain the same in the amended Plan as it was in the prior Plan. In contrast, the trustees read section 411(a)(8) to permit them to designate any age as the normal retirement age, subject to the limitation that it cannot be later than the date a participant attains age 65 unless the participant has not accumulated 10 years of credited service, in which case the participant reaches normal retirement age after 10 years of credited service. The trustees concede that participants in the pre-ERISA Plan have a right to benefits at age 57 after 20 years of credited service but emphasize that the right has been incorporated into the new Plan under the designation regular retirement. They assert that nothing in section 411(a)(8) requires that they designate an age less than 65 as the normal retirement age for participants who were not enrolled in the pre-ERISA Plan.

Initially, we note that § 411(a)(8) has not yet been judicially interpreted. Therefore, in construing the section we are guided by the plain meaning of the language, *Atchison, T. & S.F. Ry. Co. v. United States*, 617 F.2d 485 (7th Cir. 1980), as well as Congressional intent. The legislative history to § 411(a)(8) indicates that in fashioning minimal requirements for private pension funds, Congress intended to increase the number of individuals participating in retirement plans, H.R. No. 93-807, 93rd Cong., 2d Sess. *reprinted in* [1974] U.S. Code Cong. & Ad. News 4671, while at the same time promoting the financial integrity of those plans. H.R. No. 93-533, 93rd Cong. 1st Sess. *reprinted in* [1974] U.S. Code Cong. & Ad. News 4652. Analyzing § 411(a)(8) in this light, it is clear that Congress intended the trustees, as fiduciaries,

to balance desired benefits against economic realities. For this reason, the statute authorized any normal retirement age subject to the limitations of 65 years or 10 years of service. Under § 411(a)(8) the trustees certainly could have established a normal retirement age of less than 65; the statutory language, however, in no way requires them to do so.

Congress was aware that ERISA would require private pension funds to be substantially amended to conform to ERISA. Had it intended the normal retirement age to be the same age as that under the prior Plan it undoubtedly would have so provided. Obviously, the required amendments were costly and Congress wisely committed the task of balancing eligibility standards and benefit levels against the ability of the plans to pay. We agree that age 65 was permissibly chosen as the normal retirement age under the new Plan.

Janowski makes much of the fact that the normal retirement age was not redesignated until April 21, 1976. Citing no authority in support, he argues that in order to change the normal retirement age from 57 to 65 the trustees would have had to make the change before February 1, 1976, the date on which the ERISA reforms were incorporated into the prior Plan. Plaintiffs-Appellees, Cross-Appellants reply br. at 2. In rebuttal the trustees contend that Janowski's timeliness argument may not be considered because it was raised for the first time on appeal and, alternatively, argue that the date on which the normal retirement age was redesignated is of no significance.

It is axiomatic that generally we may not review issues raised for the first time on appeal. *Houser* v. *General Motors Corp.*, 595 F.2d 366, 371 (7th Cir. 1979). We need not decide the timeliness issue, however, for assuming *arguendo* that the issue was preserved, it fails. In oral argument Janowski conceded that under ERISA the trustees could have changed the retirement age to 65 had they done so before February 1, 1976. Janowski in-

terprets the word "plan" in the phrase "normal retirement age under the plan," 29 U.S.C. § 1002(24), 26 U.S.C. § 411(a)(8), to refer to the pre-ERISA Plan. He strenuously argues that, since 65 was not the normal retirement age under the pre-ERISA Plan or on the day the ERISA reforms became effective, the trustees had no authority to alter this age.

We do not read the word "plan" to have the restrictive definition Janowski urges. Nothing in the statutory language implies that the normal retirement age must be the age designated under the earlier Plan. In fact, § 411 makes no reference to any pre-ERISA provision. It merely states that a normal retirement age be specified and provides that this age may be lower than 65 but not greater than 65, provided that at 65 the participant has accumulated 10 years of credited service. The trustees did all that the statute required by specifying an age not greater than 65. We do not agree with Janowski that the date on which the pre-ERISA plan was revised to comply with the statute is significant. The statute did not require pre-ERISA plans to be amended on the date it became effective. Thus, pre-ERISA benefits accrued under the prior Plan until February 1, 1976; pre-ERISA benefits could not accrue after ERISA became effective. Since the trustees concededly had the right to change the retirement age to 65 on February 1, 1976, they also had the right to make this change on April 21, making it retroactively effective as of February 1, 1976.

III

The next consideration is whether the amended Plan incorporated a proper method for computing accrued benefits during pre-ERISA years. The statute[3] sets forth

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[3] 29 U.S.C. § 1054(b)(1)(D) in part provides:

> [A] defined benefit plan satisfies the requirements of this subparagraph with respect to such years of participation only if the accrued benefit of any par-

two formulas to be applied to pre-ERISA years. Subsection (i) provides that accrued benefits shall be determined "under the plan, as in effect from time to time prior to September 2, 1974." This subsection is triggered whenever a prior plan contained an accrued benefit formula. Subsection (ii) provides the formula to be applied if the old plan had no accrued benefit formula.

It is undisputed that the prior Plan did not specify a formula. However, relying on the fact that the prior Plan provided for a full benefit of $450 per month for persons retiring at age 57 after 20 years of qualified service, the district court reasoned that 1/20th of the benefits implicitly accrued in each of the 20 years of qualified service. We reject the concept of implied accrual of benefits, for had Congress intended that a formula based on required years of service be implied whenever a plan did not specify one, subsection (ii) would be superfluous. Since statutes should be construed so as to give effect to all their parts, *People v. Consolidated Rail Corp.*, 589 F.2d 1327 (1978), *cert. denied*, 442 U.S. 942 (1979), and since there was no accrued benefit formula in the prior Plan, subsection (ii) should have been applied.

IV

We next consider whether the amended Plan provides appropriate accrual for part-time service. Under section 4.04 of the amended Plan, employees who work less than

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[9] (Continued)

ticipant with respect to such years of participation is not less than the greater of—

(i) his accrued benefit determined under the plan, as in effect from time to time prior to September 2, 1974, or

(ii) an accrued benefit which is not less than one-half of the accrued benefit to which such participant would have been entitled if subparagraph (A), (B), or (C) applied with respect to such years of participation.

20 weeks receive no accrued credit, employees who work between 20 and 35 weeks receive one-half year credit, and employees who work more than 35 weeks receive a full year's credit. The district court concluded that this "rough allocation" of credit was contrary to 26 U.S.C. § 411(b)(3)(B)[3] because it was too imprecise. In reaching its decision that the allocation was not sufficiently ratable, the district court relied on two of the examples set forth in the regulation implementing § 411(b)(3)(B), 29 C.F.R. § 2530.2042(c)(4).[4] These two examples con-

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[3] 26 U.S.C. § 411(b)(3)(B) provides:

> Less than full time service.—For purposes of this paragraph, except as provided in subparagraph (C), in the case of any employee whose customary employment is less than full time, the calculation of such employee's service on any basis which provides less than a ratable portion of the accrued benefit to which he would be entitled under the plan if his customary employment were full time shall not be treated as made on any reasonable and consistent basis.

[4] 29 C.F.R. § 2530.204-2(c)(4) sets forth examples of acceptable credit allocations:

> *Examples.* The following are examples of reasonable and consistent methods for crediting partial years of participation:
>
> (i) A plan requires 2,000 hours of service for a full year of participation. An employee who is credited during a computation period with no less than 1,000 hours of service but less than 2,000 hours of service is credited with a partial year of participation equal to a portion of a full year of participation determined by dividing the number of hours of service credited to the employee by 2,000.
>
> (ii) A plan requires 2,000 hours of service for a full year of participation. The plan credits service in an accrual computation period in accordance with the following table:

tained computations which more accurately credit a part-time employee for the specific amount of time worked.

The trustees argue that the district court erred by treating these examples as regulations. They emphasize that the statute does not provide a formula for prorating credit but simply requires that the partial year crediting be reasonable and ratable. The trustees contend that the amended Plan fulfills these limitations. Hence, they insist that the district court had no authority to interfere with their discretion by imposing its own notion of reasonableness to require a more precise allocation than contemplated by the statute or the regulations.

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[4](Continued)

Hours of service credited	Percentage of full year of participation credited
1000	50
1001 to 1200	60
1201 to 1400	70
1401 to 1600	80
1601 to 1800	90
1801 and above	100

Under this method of crediting partial years of participation, each employee who is credited with not less than 1,000 hours of service is credited with at least a ratable portion of a full year of participation.

(iii) A plan provides that each employee who is credited with at least 1,000 hours of service in an accrual computation period must receive credit for at least a partial year of participation for that computation period. For full accrual, however, the plan requires that an employee must be credited with a specific number of hours worked; employees who meet the 1,000 hours of service requirement but who are not credited with the specified number of hours worked required for a full year of participation are

Trustees' position fails. Under the formula adopted by the trustees, employees who have worked 21 weeks receive the same credit as those who work 34 weeks. For employees who work more than 21 weeks, the allocation is neither reasonable nor ratable. Janowski has propounded a method of computation whereby employees who work between 21 and 34 weeks would fall within one of the six groups, each group receiving increased credit for time worked on a percentage basis up to 35 weeks, at which point credit for the entire year would be given. Under his proposed amendment, an employee who works 20 but less than 21 weeks would receive .5

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*(Continued)

credited with a partial year of participation on a prorata basis. For example, if the plan requires 1,500 hours worked for full accrual, an employee with 1,500 hours worked would be credited with full accrual, but an employee with 1,000 hours worked and 500 other hours of service would be credited with ⅔ of full accrual. The plan's method of crediting service for accrual purposes is consistent with the requirements of this paragraph. It should be noted, however, that use of hours worked as a basis fo. prorating benefit accrual may result in discrimination prohibited under section 401(a)(4) of the Code.

(iv) Employee A is employed on June 1, 1980 in service covered by a plan with a calendar year accrual computation period, and which requires 1,800 hours of service for a full accrual. Employee A completes 500 hours from June 1, 1980 to December 31, 1980, and completes 100 hours per month in each month during 1981. A is admitted to participation on July 1, 1981. A is credited with 1,200 hours of service for the accrual computation period beginning January 1, 1981. Under the rules set forth in paragraph (c)(3) of this section, A is required to be credited with not less than one-third of a full accrual (600 hours divided by 1,800 hours).

year credit, an employee who works 21 but less than 24 weeks would receive .6 year credit, an employee who works 24 but less than 28 weeks would receive .7 year credit, an employee who works 28 but less than 31 weeks would receive .8 year credit, an employee who works 31 weeks but less than 35 weeks would receive .9 year credit, and an employee who works 35 weeks or more would receive a full year's credit. This proposed Plan amendment satisfies the statute and should be incorporated into the amended Plan.

V.

With respect to early retirement benefits or deferred benefits it is undisputed that any participant enrolled in the original Plan retains the choice to receive either the new Plan's "formula" benefit or the prior Plan's "scheduled" benefit, whichever is greater. The trustees maintain that because this fact is undisputed and clearly set forth in the July 1979 Summary Plan Booklet, the entry of an injunction preserving this option is unnecessary and inappropriate.

As required by Fed. R. Civ. P.65(d), the district court set forth its reasons for issuing the permanent injunction. It found that injunctive relief was appropriate for two reasons: (1) the improper schedule set forth in the 1978 Plan description booklet could be readopted by the trustees and (2) retroactivity of the amendment in the July 1979 booklet was not clearly specified.

We cannot agree. In determining whether to issue a permanent injunction the likelihood of future violations must be viewed in light of past conduct. *SEC* v. *Resch-Cassin & Co., Inc.*, 362 F.Supp. 964 (S.D.N.Y. 1973). We are also mindful that injunctive relief is not appropriate to prevent the possible occurrence of an event at some indefinite future time. *Interco Inc. v. FTC*, 478 F. Supp. 103 (D.D.C. 1979). In this case no participant has been

refused prior Plan "scheduled benefits," nor is there any evidence indicating that the trustees will revoke this option. The trustees have consistently stated that the option to receive benefits under the Plan was available to participants enrolled in the Plan before ERISA became effective. Indeed, although the trustees omitted the prior Plan's schedule of benefits in the January 1978 Summary Plan Description Booklet, this omission was corrected in the following year's booklet, which clearly states that "those Participants who enter Covered Employment prior to July 1, 1976 shall have the option of receiving the amount of the Early Retirement Pension as determined in Section 3.08[a] [of the amended Plan] or the monthly amount of Early Retirement Pension according to the following Schedule [computed according to the prior Plan]." July 1979 Pension Plan & Summary Plan Description at 72. Therefore, there is no reason to conclude that the trustees will attempt to revoke the option or deny a participant benefits rightfully due. If a participant is, in the future, improperly denied benefits, an action can be brought at that time and an award of damages can be fashioned which will adequately compensate for any loss. *Banks v. Trainor,* 525 F.2d 837 (7th Cir. 1975), *cert. denied,* 424 U.S. 978 (1976). Accordingly, the injunction should not have been entered.

VI

Lastly, we consider whether the award of attorneys' fees was proper. The trial court ordered the Fund to pay $142,485.00 in attorneys' fees for several reasons: (1) fees and expenses are authorized by the statute, (2) the class prevailed on all but one major issue, and (3) the litigation obtained a financial benefit for many members of the class. The trustees do not dispute that an award of attorneys' fees may be appropriate in some ERISA actions, but, relying on *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.,* 540 F.2d 102, 109-11 (3d Cir. 1976), argue that an award of attorneys' fees is inappropriate where, as here, the litiga-

tion involves competing interests in a common fund. They contend that there has been no net benefit to the entire class of Fund participants as the result of the litigation. Again, relying on *Lindy Brothers*, they maintain that where there is no benefit to the Fund, fees may not be awarded. Further, they stress that Janowski did not prevail on the normal retirement age which, they contend, is the principal issue.

It is well-settled that the standard of review of trial court awards of attorneys' fees is abuse of discretion and that "[a]n abuse of discretion is found only when there is a definite conviction that the court made a clear error of judgment in its conclusion upon weighing relevant factors." *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 452 (9th Cir. 1980). It is equally well-settled that in determining whether an award of attorneys' fees in suits brought under ERISA is appropriate, courts have considered the following factors: (1) the degree of the offending parties' culpability or bad faith; (2) the degree of the ability of the offending parties to satisfy personally an award of attorneys' fees; (3) whether or not an award of attorneys' fees against the offending parties would deter other persons acting under similar circumstances; (4) the amount of benefit conferred on members of the pension plan as a whole; and (5) the relative merits of the parties' positions. *Iron Workers Local 272 v. Bowen*, 624 F.2d 1255 (5th Cir. 1980); *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978).

Unfortunately, the district court did not justify its decision to award attorneys' fees in terms of these specific guidelines, which would have been helpful in reviewing its decision for abuse of discretion. However, while a fuller explanation of its reasoning would have been helpful, there is sufficient analysis in the district court's decision to permit review. The district court primarily based its award on the fact that Janowski, although not wholly successful, generally prevailed on the merits, thereby preventing retirees under this and

other employee pension funds from being underpaid. It also noted that although the trustees did not act in bad faith or with the intent to deprive, they failed to cooperate with Janowski in complying with at least one court order[4] and by their dereliction may have contributed to an additional expenditure of time by Janowski's attorneys. Further, distinguishing *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir. 1976), the district court recognized that the fees would not be paid out of a fund which could be recovered from the trustees and balanced this factor against the fact that the Plan's assets had significantly increased over paid benefits and that the fee award was a small factor of the total fees paid to the Fund's attorneys in the previous fiscal year. Only the factor of whether or not an award of attorneys' fees against the offending party would deter other persons acting under similar circumstances was not specifically addressed.

Fee provisions are designed as an enforcement incentive to insure that aggrieved parties who are unable to pay their own attorneys' fees are not denied access to the courts. In situations where aggrieved parties are suing as "private attorneys general," advancing a public interest, the award of attorneys' fees and costs generally has been automatic, unless special circumstances rendered the award unjust. Thus, the discretionary fee provisions in the civil rights statutes are considered virtually mandatory. The award of fees as an enforcement incentive is not as great, however, in an ERISA action for two reasons. First, fiduciaries have a statutory obligation to

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[4] On July 24, 1980, the district court ordered the trustees to cooperate with plaintiffs in reaching a declaratory judgment which had, up to that point, been agreed upon in form only and in drafting the necessary amendments to the Plan. The trustees refused to comply with this order, thereby necessitating an additional expenditure of time by plaintiff's attorneys.

insure that plans are properly administered. 29 U.S.C. § 1105. Second, while plan participants may be suing for the benefit of all beneficiaries of a particular fund, they may also be suing merely on their own behalf.

Accordingly, it is clear that the policies reflected in ERISA, statutorily authorized award of fees is not so compelling that the discretionary provision should be construed as virtually mandatory. *Iron Workers Local 272 v. Bowen*, 624 F.2d 1255, 1265 (5th Cir. 1980). Nevertheless, we believe that this award is justified because the litigation benefitted a substantial group of Fund participants and that the award is necessary to enable aggrieved parties to invoke the power of the court when pre-ERISA benefits are in danger. The award of fees is not an abuse of discretion.

Finally, we consider the amount of the award. The district court carefully and thoroughly analyzed the complexity and unsettled nature of the questions involved, the expertise of the attorneys, and the time expended to arrive at the hourly rate of $100 and $125 and the multiplier of two. We adopt the district court's analysis and conclusion with respect to the amount awarded and, as a consequence, need not repeat it. Because the award was based on several factors, only one of which was whether Janowski was the prevailing party, nothing in our decision requires recomputation of the amount awarded.

The district court's decision is affirmed with respect to exhaustion, ripeness, class representation, normal retirement age and credit for part-time benefits. The district court's opinion is reversed with respect to calculation of accrued benefits and the entry of a permanent injunction is vacated. Each party is to bear its own appeal costs. Accordingly, the district court's decision is

AFFIRMED IN PART and REVERSED IN PART.

FAIRCHILD, *Senior Circuit Judge*, dissenting in part.

I agree that the Plan formula for calculating credits for a part-time employee does not comply with Sec. 411(b)(3)(B).

A Plan need not, under subparagraph (C), provide for credit for a part-time employee with less than 1,000 hours (about 22 weeks) of service during a year.[1] For service beyond that, subparagraph (B) requires that the formula provide not less than a ratable portion of the accrued benefit for full-time employment.

This Plan does not define full-time employment. Even if it specified 52 weeks, however, its formula for part-time service would provide less than a ratable portion for persons with more than 26 weeks but less than 35 weeks of service. One with 27 to 34 weeks of service would have to receive more than the one-half year's credit allowed by the Plan in order to get a portion "not less than ratable."

In its present form, the Plan may be construed as defining full-time employment as 35 weeks, since it awards full credit at that point. If 35 weeks be deemed full-time employment, it would follow that, however detailed the steps in the formula, one with 22 weeks of service must receive at least 22/35ths of one year's credit, one with 25 weeks must receive at least 5/7ths, and one with 30 weeks must receive at least 6/7ths.

It is clear that the Plan must be modified, but I do not agree that the court should specify any particular complying formula. I note, moreover, that there are instances where the formula set forth in Part IV of the majority opinion fails to provide not less than a ratable portion unless full-time employment be defined as at least 39 weeks, e.g., if 23 be divided by any number less than 39, the quotient exceeds .6.

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[1] Under 29 C.F.R. § 2530.200b-3(e)(1)(ii), each week of employment is the equivalent of 45 hours of service.

I am also of the opinion that the allowance of attorneys' fees should be reduced. The implied accrual formula, dealt with in Part III of this court's opinion, appears to be the most significant victory of the class members before the district court, and we are reversing that part of the decision.

Except for the foregoing, I concur.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

April 7, 1982

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. THOMAS A. FAIRCHILD, *Senior Circuit Judge*
Hon. WESLEY E. BROWN, *Senior District Judge**

Nos. 81-1340 & 81-1359

WILLIAM R. JANOWSKI and ROBERT H. BARNHISEL, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees, Cross-Appellants,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 710 PENSION FUND, WILLIAM D. JOYCE, JOHN D. KELAHAN, ANTHONY CURCIO, ROBERT J. BAKER, JOHN H. BARRANCO, and ROY M. PRIDE,

Defendants-Appellants, Cross-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 78 C 841

THOMAS R. MCMILLEN

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* The Honorable Wesley E. Brown, Senior Judge of the United States District Court for the District of Kansas, is sitting by designation.

ORDER

On consideration of the petitions for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by both Plaintiffs-Appellees, Cross-Appellants William R. Janowski, et al., and by Defendants-Appellants, Cross-Appellees International Brotherhood of Teamsters Local 710 Pension Fund, et al., no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

It is ordered that the aforesaid petitions for rehearing be, and the same are hereby, DENIED.

STATUTES AND REGULATION

26 U.S.C. §411(a) (8)

(8) NORMAL RETIREMENT AGE. — For purposes of this section, the term "normal retirement age" means the earlier of —

(A) the time a plan participant attains normal retirement age under the plan, or

(B) the later of —

(i) the time a plan participant attains age 65, or

(ii) the 10th anniversary of the time a plan participant commenced participation in the plan.

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26 U.S.C. §411(b)(1)(D)

(D) ACCRUAL FOR SERVICE BEFORE EFFECTIVE DATE. — Subparagraphs (A), (B), and (C) shall not apply with respect to years of participation before the first plan year to which this section applies, but a defined benefit plan satisfies the requirements of this subparagraph with respect to such years of participation only if the accrued benefit of any participant with respect to such years of participation is not less than the greater of —

(i) his accrued benefit determined under the plan, as in effect from time to time prior to September 2, 1974, or

(ii) an accrued benefit which is not less than one-half of the accrued benefit to which such participant would have been entitled if subparagraph (A), (B), or (C) applied with respect to such years of participation.

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29 U.S.C. §1002(24)

(24) The term "normal retirement age" means the earlier of —

(A) the time a plan participant attains normal retirement age under the plan, or

(B) the later of —

(i) the time a plan participant attains age 65, or

(ii) the 10th anniversary of the time a plan participant commenced participation in the plan.

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29 U.S.C. §1054(b)(1)(D)

(D) Subparagraphs (A), (B), and (C) shall not apply to years of participation before the first plan year to which this section applies but a defined benefit plan satisfies the requirements of this subparagraph with respect to such years of participation only if the accrued benefit of any participant with respect to such years of participation is not less than the greater of —

(i) his accrued benefit determined under the plan, as in effect from time to time prior to September 2, 1974, or

(ii) an accrued benefit which is not less than one-half of the accrued benefit to which such participant would have been entitled if subparagraph (A), (B), or (C) applied with respect to such years of participation.

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26 C.F.R. §1.411(a)-7(b)(1)

For purposes of subdivision (i) of this subparagraph, if an age is not specified by a plan as the normal retirement age, then the normal retirement age under the plan is the earliest age beyond which the participant's benefits under the plan are not greater solely on account of his age or service.

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OCT 30 1979

Dear Mr. Grasso:

This is in response to your recent letter in which you request information concerning interpretation of the phrase "normal retirement age under the plan" as stated in section 411(a)(8)(A) of the Internal Revenue Code.

Section 411(a)(8) of the Code provides that the term "normal retirement age" means the earlier of (A) the time a plan participant attains normal retirement age under the plan, or (B) the later of the time a plan participant attains age 65, or the 10th anniversary of the time a plan participant commenced participation in the plan.

Normal retirement age is the lowest age specified in a plan at which the employee has the right to retire without the consent of the employer and receive retirement benefits based on service to date of retirement at the full rate (without actuarial reduction for earlier commencement) for such service set forth in the plan.

However, any reasonable optional early retirement age will generally be acceptable provided that if the employer's consent is required, the value of the early retirement benefit does not exceed the value of the employee's vested benefits at that time.

Under a pension plan, the normal retirement age is the time from which definitely determinable benefits become fixed and payable. Any employee who has reached such age and met all service requirements and any other applicable provisions of the plan must be allowed to retire and commence receiving benefits payable under the plan. However, provision may be made for additional benefits on account of service after normal retirement age provided such provision is uniformly applicable to all employees under similar circumstances and does not result in prohibited discrimination.

We hope this information will be of assistance to you.

Sincerely yours,

/s/ A. D. Fields
A. D. Fields
Chief, Employee Plans
Technical Branch

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 82-37

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM R. JANOWSKI, ET AL.,
Petitioners,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS
LOCAL NO. 710 PENSION FUND, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	3
I. The Petition Does Not Satisfy The Standards Of Rule 17	3
II. The Decision Below Is Correct	5
CONCLUSION	11
APPENDIX	1a

INDEX OF CITATIONS

CASES:	
Black v. Cutter Laboratories, 351 U.S. 292	7
STATUTES:	
Employee Retirement Income Security Act of 1974, 88 Stat. 891, as amended, 94 Stat. 1295, 29 U.S.C. §§ 1001 *et seq.*:	
§ 3(24), 29 U.S.C. § 1002(24)	2, 5
§ 203, 29 U.S.C. § 1053	5
§ 204(b)(1)(D), 29 U.S.C. § 1054(b)(1)(D)	3, 9
Internal Revenue Code:	
26 U.S.C. § 411	5, 7
26 U.S.C. § 411(a)(8)	2, 5
26 U.S.C. § 411(b)(1)(D)	3, 9
TREASURY REGULATIONS:	
29 C.F.R. § 1.411(a)-7(b), T.D. 7501, 42 F.R. 42329 (August 23, 1977)	7, 8
REVENUE PROCEDURES AND RULINGS:	
Revenue Rulings:	
Rev. Rul. 71-147, 1971-1 C.B. 116	8
Rev. Rul. 78-120, 1978-1 C.B. 117	8, 9
Rev. Rul. 80-276, 1980-2 C.B. 131	9

INDEX OF CITATIONS—Continued

	Page
Technical Information Release 1415, Prentice-Hall, *Pension and Profit Sharing* § 107,117 (November 5, 1975)	9
Technical Information Release 1416, Prentice-Hall *Pension and Profit Sharing* § 107,118 (November 5, 1975)	9
RULES:	
U.S. Sup. Ct. Rules:	
17	3
21.1(j)	3
21.5	5
MISCELLANEOUS:	
Legislative History of the Employee Retirement Income Security Act of 1974 (G.P.O. 1976)	10

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

The Petition herein arises from the same judgment as No. 82-151, a Petition for Certiorari filed by the present respondents (the defendants in this action)—International Brotherhood of Teamsters Local No. 710 Pension Fund (sometimes referred to as "the Fund" or "the Plan") and its Trustees.

The claims in the Complaint and the prior proceedings are more fully described at pp. 3-8 of the Petition in No. 82-151. The questions raised by that Petition are, however, entirely distinct from those raised by plaintiffs' present Petition (No. 82-37) which focuses on two provisions of the Plan whose legality was sustained by the Court of Appeals.[1] Those provisions were adopted as part

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[1] One of the issues in No. 82-151 is whether the plaintiffs' challenge to a different plan provision (which the court below struck down) is justiciable. We do not concede the justiciability of the

of a series of amendments to the Plan made by the Trustees in 1976 to comply with the Employee Retirement Income Security Act of 1974, 88 Stat. 891 (ERISA). These amendments were submitted to and approved by the Internal Revenue Service. (*See* Pet. 28a).[2]

§ 1.16 of the amended Plan provides in full: " 'Normal Retirement Age' shall mean age sixty-five (65), or if later, the age of the Participant on the tenth (10) anniversary of his participation." (A. 158) Prior to ERISA the Plan had defined the 57th birthday as the "normal retirement date" and age 57 as the "normal retirement age." (A. 108, 110). As amended, the Plan provides the same benefits to pre-ERISA participants who retire at age 57, which is now defined as the "regular retirement age." (Section 1.18, A. 158). Both courts below held that the definition in § 1.16 is valid and is to be treated as the "normal retirement age" for purposes of the vesting provisions of ERISA, in accordance with the statutory definition, 29 U.S.C. § 1002(24), 26 U.S.C. § 411(a)(8). *See* Pet. 2a-4a, 27a-31a.

The other provision which is challenged in No. 82-37 is § 3.10 of the Plan (A. 161-162), which determines the "method for computing accrued benefits during pre-ERISA years." (*See* Pet. 31a.) The particular terms of the present plan's accrual formula do not appear to be pertinent, but for completeness the provision is set forth as an Appendix to this Brief. What is material is that, as the Court of Appeals said, "[i]t is undisputed that the prior Plan did not specify a formula." (Pet. 32a, see also Pet. 4a.) The District Court nevertheless implied an accrual formula for pre-ERISA service because the pre-ERISA plan "did provide for specific benefits to persons retiring

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claims which are involved in No. 82-37, but do not discuss the point in this Brief because review is unwarranted even on the Court of Appeals' premise that these claims are justiciable.

[2] "Pet." refers to the Petition for Certiorari in No. 82-37. "A." will refer to the Appendix of Defendants-Appellants in the Court of Appeals.

at age 57 after 20 years of qualified service." (Pet. 4a.)[3] The Court of Appeals "reject[ed] the concept of implied accrual of benefits, for had Congress intended that a formula based on required years of service be implied whenever a plan did not specify one, subsection (ii) [of 29 U.S.C. § 1054(b)(1)(D)] would be superfluous." (Pet. 32a.)

REASONS FOR DENYING THE WRIT

I. The Petition Does Not Satisfy The Standards Of Rule 17

Rule 21.1(j) of this Court provides that a petition for certiorari shall contain a "direct and concise argument amplifying the reasons relied on for the allowance of the writ. See Rule 17". But the Argument of the present Petition is in defiance of, rather than compliance with, the standards delineated in Rule 17. No conflict is asserted between the decision below and any decisions of this Court or of any other court. No assertion is made that the court below has departed from the accepted and usual course of judicial proceedings or sanctioned such a departure. Nor is it asserted in the argument that either of the questions tendered by the Petition is of such importance that it should be settled by this Court. Instead, the argument consists of a tendentious statement of petitioners' view of the merits, combined with repeated characterization of the decision below as "erroneous" or "clearly erroneous" (Pet. 10, 11, 12, 14, 17, 18)—as if this were a Court of Errors.

The closest that petitioners come to addressing the grounds for discretionary review as set forth in Rule 17 is a single paragraph under the heading "JURISDICTION" (Pet. 2). The importance of the questions pre-

[3] The District Court ruled that "Section 3.10 . . . is inconsistent with the requirements of 29 U.S.C. § 1054(b)(1)(D) and must be reformed to provide for the accrual of benefits at the rate of $22.50 for each year of credited service prior to February 1, 1976, subject to a maximum of $450.00." (Pet. 10a).

sented is there claimed, but certainly not demonstrated. Given the vast number of private pension plans covered by ERISA, this Court obviously cannot review a Court of Appeals' decision whenever it involves "issues of first impression involving the proper interpretation of" that complex enactment (*id.*).

The "questions presented for review" identify no statutory issue, but are confined to whether "the Trustees of Teamsters Local No. 710 Pension Plan can" lawfully do what petitioners say they have done (Pet. i).[4]

The statement that the decision below "directly affects the benefits of approximately 15,302 participants in" (*id.*) respondent Fund is true, but (like the first question presented, Pet. i) it is misleading insofar as it conveys the impression that all or even a majority of these participants are *adversely* affected by that decision. Plainly, since the assets of the Fund are finite, the eligibility and benefit provisions of the plan which the Court of Appeals approved favor some participants and disfavor others.

Petitioners also attempt to magnify the importance of the decision below by saying that other plans may be affected thereby, though without indicating how many plans have provisions similar to those which they challenge. We cannot say that there are none, since it is reasonable to assume that trustees of other plans, advised by their attorneys and actuaries, made similar adjustments to comply with the requirements of the new law. The circumstance that the resulting plans were—as they were required to be—approved by the Internal Revenue

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[4] Moreover, neither question accurately describes even this case. As to the first question, the major misstatement is that it omits the real basis of the decision below—that the Trustees in revising the plan properly determined 65 to be the "normal retirement age," in accordance with the statutory definition. As to the second question, the Trustees have not "ignore[d] benefits payable under the terms of the pre-ERISA plan * * *"; they have only refused to attribute to that plan a nonexistent accrual formula.

Service would support the legality of the provisions challenged herein. And the Court of Appeals' action in confirming their legality does not even remotely justify further consideration by this Court.

II. The Decision Below Is Correct

For the reasons just stated, review of the decision below would not be warranted even if petitioners' claims of error were well taken. But when one cuts through the fog created by petitioners' semantic quibbles[5] to the statutory provisions whose meaning is at issue, the Court of Appeals' decision is easily seen to be correct.

A. Both 29 U.S.C. § 1002(24) and 26 U.S.C. § 411(a)(8) define "normal retirement age" as

> (A) the time a plan participant attains normal retirement age under the plan, or
>
> (B) the later of—
>
> (i) the time a plan participant attains age 65, or
>
> (ii) the 10th anniversary of the time a plan participant commenced participation in the plan.

That definition triggers the minimum vesting standards of 29 U.S.C. § 1053 and 26 U.S.C. § 411. Section 1.16 of the respondents' plan expressly defines age 65 as the "normal retirement age" under the plan. On its face, this definition clearly permits pension plans to determine what the "normal retirement age" shall be, as long as that age satisfies the standards set forth in subparagraph (B), as this plan concededly does. Nevertheless, petitioners argue that the court below erred in holding that the "normal retirement age" under the plan is 65—as is provided therein—rather than 57, which was designated

---

[5] Cf. U.S. Sup. Ct. Rule 21.5:

> The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

as the "normal retirement age" in one paragraph of the pre-ERISA plan. This contention lacks merit.

There is simply nothing in ERISA which deprives trustees of the authority to designate 65 as the "normal retirement age" merely because their plan happened to use that term for some earlier age in the pre-ERISA plan before ERISA gave it a new technical meaning. As the Court of Appeals reasoned:

> Initially, we note that [26 U.S.C.] § 411(a)(8) has not yet been judicially interpreted. Therefore, in construing the section we are guided by the plain meaning of the language, *Atchison, T. & S.F. Ry. Co. v. United States*, 617 F.2d 485 (7th Cir. 1980), as well as Congressional intent. The legislative history to § 411(a)(8) indicates that in fashioning minimal requirements for private pension funds, Congress intended to increase the number of individuals participating in retirement plans, H.R. No. 93-807, 93rd Cong., 2d Sess. *reprinted in* [1974] U.S. Code Cong. & Ad. News 4671, while at the same time promoting the financial integrity of those plans. H.R. No. 93-533, 93rd Cong. 1st Sess. *reprinted in* [1974] U.S. Code Cong. & Ad. News 4652. Analyzing § 411(a)(8) in this light, it is clear that Congress intended the trustees, as fiduciaries, to balance desired benefits against economic realities. For this reason, the statute authorized any normal retirement age subject to the limitations of 65 years or 10 years of service. Under § 411(a)(8) the trustees certainly could have established a normal retirement age of less than 65; the statutory language, however, in no way requires them to do so.
>
> *Congress was aware that ERISA would require private pension funds to be substantially amended to conform to ERISA. Had it intended the normal retirement age to be the same age as that under the prior Plan it undoubtedly would have so provided.* Obviously, the required amendments were costly and Congress wisely committed the task of balancing eligibility standards and benefit levels against the abil-

ity of the plans to pay. We agree that age 65 was permissibly chosen as the normal retirement age under the new Plan. [Pet. 29a-30a, emphasis added] [6]

The Court of Appeals' conclusion is confirmed, as the District Court expressly recognized (Pet. 3a), by Department of Treasury Regulation 26 C.F.R. § 1.411(a)-7(b). Subparagraph 7(b)(1) sets forth the "general rule" for determining the "normal retirement age" under 26 U.S.C. § 411 and regulations thereunder; it is reproduced in full in the margin.[7]

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[6] Petitioners seize on an apparent misstatement of their contention below (Pet. 13). "This Court, however, reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297. And, as shown above, the Court of Appeals' analysis of the merits addressed and rejected petitioners' actual position.

[7] (b) *Normal retirement age*—(1) *General rule.* For the purposes of section 411 and the regulations thereunder, the term "normal retirement age" means the earlier of—

(i) The time specified by a plan at which a plan participant attains normal retirement age, or

(ii) The later of—

(A) The time the plan participant attains age 65, or

(B) The 10th anniversary of the date the plan participant commences participation in the plan.

If a plan, or the employer sponsoring the plan, imposes a requirement that an employee retire upon reaching a certain age, the normal retirement age may not exceed that mandatory retirement age. The preceding sentence will apply if the employer consistently enforces a mandatory retirement age rule, whether or not set forth in the plan or any related document. For purposes of subdivision (i) of this subparagraph, if an age is not specified by a plan as the normal retirement age then the normal retirement age under the plan is the earliest age beyond which the participant's benefits under the plan are not greater solely on account of his age or service. For purposes of paragraph (b)(1)(ii)(B) of this section, participation commences on the first day of the first year in which the participant commenced his participation in the plan, except that years which may be disregarded under section 410(a)(5)(D) may be disregarded in determining when participation commenced.

The entire § 1.411(a)-7 was first published as T.D. 7501, 42 F.R. 42329, Aug. 23, 1977.

Subparagraph 7(b)(2) contains illustrations of 7(b)(1); the first of these is squarely in point:

> (2) EXAMPLES. The provisions of this paragraph are illustrated by the following examples:
>
> EXAMPLE (1). Plan A defines normal retirement age as age 65. Under the plan, benefits payable to participants who retire at or after age 60 are not reduced on account of early retirement. For purposes of section 411 and the vesting regulations, normal retirement age under Plan A is age 65 (determined under subparagraph (1)(i) of this paragraph). This is true even if in operation all participants retire at age 60.

Subparagraph (1)(i) referred to in the Regulation follows the ERISA definition, "the time specified by a plan at which a plan participant attains normal retirement age." See n.7, *supra*. Plan A in the example illustrates the 710 Plan. Normal retirement age is defined as age 65. Benefits are paid earlier (at age 57 in the Local 710 Plan; at age 60 in Plan A), but this is irrelevant to the point of the example, which is that for purposes of ERISA's definition and vesting regulations, the "normal retirement age" is age 65.[8]

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[8] This example, which petitioners disregard, also refutes their claim that subparagraph 7(b)(1) supports *their* position (Pet. 11). Moreover the sentence from which the petitioners quote is, even on its face, inapplicable here because it applies only "if an age is not specified by a plan as the normal retirement age," whereas the respondent Plan *does* specify an age (65) as the "normal retirement age."

The I.R.S. official's letter quoted at Pet. 10 likewise does not purport to deal with plans which have defined the "normal retirement age." And even if the letter could be read to support petitioners, this Court does not sit to review conflicts between a Court of Appeals and an I.R.S. official—least of all where that court's decision accords with a Treasury Regulation.

Petitioners deem it necessary to invoke Rev. Rul. 71-147, 1971-1 C.B. 116 (Pet. 9-11) which antedated ERISA, without acknowledging that it was "modified" in Rev. Rul. 78-120, 1978-1 C.B. 117 and

In sum, petitioners' argument that the courts below misconstrued the statutory definition of "normal retirement age" as applied to this plan is baseless.[9]

B. In the argument supporting their second question presented (Pet. 15-18), petitioners fail to identify expressly which subsection of 29 U.S.C. § 1054 (b) (1) (D) and 26 U.S.C. § 411(b) (1) (D) is the basis of their claim. It appears, however, that their reliance is on subsection (i) which refers to the participants' "accrued benefit determined under the plan, as in effect from time to time prior to September 2, 1974." The Court of Appeals determined that subsection (i) was not applicable because "it is undisputed that the prior Plan did not specify any formula" and that subsection (ii) therefore governs.[10]

Petitioners say: "The Court sought an ERISA-style ratable formula in the pre-ERISA plan, and of course, found none." (Pet. 17) The Court found none because there was none. That should be the end of the matter.

"superseded" by Rev. Rul. 80-276, 1980-2 C.B. 131. The passage from Rev. Rul. 78-120 quoted at Pet. 10 merely describes the pension plan concerning which advice was given therein. That plan provided for a normal retirement age of less than 65. Approval of such a plan obviously does not imply *disapproval* of plans, like the Local 710 plan, which provide for a "normal retirement age" of 65.

[9] Petitioners' further point, that the Plan amendment which they challenge was untimely (Pet. 14), was not presented to the District Court. The Court of Appeals, without deciding whether the issue was properly before it, rejected it on the merits. (Pet. 30a-31a.) Petitioners' afterthought plainly lacks general importance and is wholly undeserving of this Court's attention. Indeed, (as defendants advised the Court of Appeals at their first opportunity) the amendment was adopted pursuant to a "Special Reliance Procedure" promulgated by I.R.S. *See* Technical Information Releases 1415 and 1416, Prentice-Hall, *Pension and Profit Sharing* ¶¶ 107,117 and 107,118.

[10] Petitioners have never contended that the Plan fails to satisfy the requirements of (ii).

It is difficult to imagine an issue less worthy of review by this Court than whether a Court of Appeals erred in determining that a particular "pre-ERISA plan did not specify an accrued benefit formula." (Pet. 17) Moreover, although their entire argument, such as it is, depends on the existence in the pre-ERISA plan of the equivalent of an accrued benefit formula", petitioners never describe what that "equivalent" was. Nor can they, since their own description (Pet. 15-16) acknowledges that the benefits payable to participants with 20 years service varied depending on the participant's age at retirement. It is for this reason that petitioners find it necessary to disown (Pet. 16) the District Court's "implicit accrual" formula (Pet. 4a, 10a) which assumed retirement after age 57 (see Pet. 32.).

Petitioners' argument is baseless also because ERISA simply does not recognize "the equivalent of an accrued benefit formula" (Pet. 17); that is a construct fabricated by petitioners for the purpose of this case. Subsection (ii) was added precisely because some plans had no benefit accrual formula, although many others did. The latter were governed by what is now subsection (i), whose terms were in the Bill from the beginning. Subsection (ii) was first adopted by the House-Senate conferees, in response to the staff's comment: "The conferees may wish to clarify whether a plan should be required to accrue benefits for service prior to the effective date, even though it has no accrual formula for this period."[11] To provide for vesting of pre-ERISA years without prescribing the amount that would vest in at least 23% of the plans affected would have rendered the newly adopted vesting provisions virtually meaningless. Accordingly, the conferees added what is now subparagraph (ii).[12]

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[11] III Legislative History of the Employee Retirement Income Security Act of 1974 (G.P.O. 1976), p. 5167 (hereafter "ERISA Leg. Hist.").

[12] See the discussion in III ERISA Leg. Hist. p. 4542.

Every pre-ERISA pension plan paid a benefit after certain age, years of service and other eligibility requirements were met. This fact alone establishes that if the legal "equivalent of an accrued benefit formula" (Pet. 17) had existed under such pre-ERISA plans, it would not have been necessary for Congress to add subsection (ii). The Court of Appeals correctly recognized that the petitioners' argument renders (ii) superfluous. (Pet. 32a) The Petition does not even confront, let alone refute, that reasoning.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari in No. 82-37 should be denied.

Respectfully submitted,

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APPENDIX

SECTION 3.10: VESTED PENSION—AMOUNT

The amount of the monthly Vested Pension is the sum of the Accrued Pension earned during each Period of Accrual based on the Pension Credits earned during each Period of Accrual and the Normal Retirement Pension in effect at the date of termination from Covered Employment during the Period of Accrual with the Accrued Pension computed, as follows:

[a] 1½% of the Normal Retirement Pension in effect when the Participant terminates Covered Employment during the Period of Accrual for each year and fraction thereof of Pension Credits earned during the Period of Accrual and earned prior to January 1, 1976; plus

[b] 3%of the amount determined in [a] for each year and fraction thereof of Pension Credits earned during the Period of Accrual and earned after January 1, 1976; plus

[c] 3% of such Normal Retirement Pension for each year and fraction thereof of Pension Credits earned during the Period of Accrual and earned after January 1, 1976.

Period of Accrual means the period of time during which the Participant earns Future Pension Credits based on his work in Covered Employment and ends on the day before the beginning of any period during which the Participant is out of Covered Employment for more than 156 consecutive calendar weeks.

In any event the monthly amount of the Accrued Pension shall not be less than $250.00 for those Participants who were in Covered Employment prior to February 1, 1976, and have at least 20 years of Pension Credits.

If a Participant elects to receive the Vested Pension before his Normal Retirement Date, the amount of such

Vested Pension will be reduced in the same manner as provided in Section 3.08[a] for Early Retirement Pension.

If a Participant makes this election, the Commencement Date of such Vested Pension will be the first day of the month following the month in which the Participant has fulfilled all the conditions for entitlement to benefits, including the filing of an application with the Controller.

It shall be the responsibility of such separated Participant to keep the Controller informed as to his address and the Controller and Trustees shall have no obligation to seek out the Participant other than sending all forms, notices, payments or other materials to the Participant's last known address.